(3)
Supreme Court, U.S.
FILED
971410 FEB 23 1998
No._____ OFFICE OF THE CLERK

In The
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL; SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBBIE GUARGANA (WILLIAMS); JOHN HOPKINS; RUTH HOPKINS; husband and wife, and the marital community composed thereof,
Plaintiffs

MERLIN E. CARLSON, JR.
Plaintiff-Petitioner

v.

GENERAL ELECTRIC COMPANY, a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
Defendants-Respondents

On Petition for Writ Of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX VOLUME II

Marcia M. Meade
Attorney for Petitioner/Counsel of Record
DAWSON & MEADE
1300 W. Dean
Spokane, Washington 99201-2015
(509) 328-4266

1173 PP

APPENDIX E

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, March 7, 1994) (Plaintiffs' Lists Of Claims, Theories Of Liability, And Identity Of Experts Who Will Be Called)..... 71a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, June 27, 1994) (Plaintiffs' Memorandum On Potential Instructional Error By Attempting To Define Area Of Injury) 88a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (Jury Instructions (Damage)) 93a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, July 27, 1994) (Defendants' Motion For Judgment As A Matter Of Law) 99a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, July 27, 1994) (Defendants' Motion For New Trial Or Alternative Relief) 101a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, December 9, 1994) (Motion That The Order Of November 25, 1994, Is A Final Decision And There Is No Just Reason For Delay) 103a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. December 29, 1994) (Plaintiffs' Reply To Defendants' Opposition To Fed.R.Civ.P. 54(B) Language) 106a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. December 28, 1994) (Affidavit Of Marcia M. Meade In Response To Defendants' Opposition To The Frcp 54(B) Language [w/ attachments]) 113a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 31, 1995) (Brief In Support Of Motion To Dismiss) 125a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 17, 1995) (Appellant Carlson's Motion To Remand For Lack Of District Court Jurisdiction And Stay Of Schedule (Frap 9th Cir. 27.11)) 133a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., January 17, 1995) (Appellant Carlson's Memorandum In Support Of Remand, Reinstatement Of Verdict, And Stay Of Proceedings Under Cir. R. 27-11.) 137a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., March 7, 1995) (Appellants' Schudel, Glass, Schudel, Schudel, Howell (Froese), Thompson, Hopkins And Hopkins Motion For Remand And For Stay Of Schedule Pursuant To Circuit Rule 27.11) 151a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., February 3, 1995) (Appellant Carlson's Reply To Appellee's Memorandum In Opposition Of Remand) 158a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No.95-35092 and 95-35145 (9th Cir., February 15, 1995) (Appellants-Plaintiffs' And Appellee Guaragna's Memorandum In Opposition To Motion To Dismiss) 166a

Organic Solvent Encephalopathy: An Old Hazard Revisited. Am. J. Ind. Med., Vol. 22 (1922).....183a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. January 18, 1994) (Offer Of Proof Of Daniel Goldstein).....198a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash. March 7, 1994) (Declaration Of Samuel Milham, Jr. On Offer Of Proof).....205a

Schudel, et al., v. General Electric and Kaiser Aluminum and Chemical Corp., No. 92-00081 (E.D. Wash, March 7, 1994) (Offer Of Proof By Plaintiffs Re: The Testimony Of Paula A. Lantsberger, M.D.) 219a

Marcia M. Meade
Edward A. Dawson
Dawson & Meade
1300 W. Dean
Spokane, WA 99201-2090
(509) 328-4266
Attorneys for Plaintiff Merlin Carlson

Craig F. Schauermann
Schauermann & Thayer
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661
(206) 695-4244
Attorneys for Plaintiffs Schudel(s), Glass, Howell, Thompson & Guaragna

Thomas C. Phelan
806 Officers Row
Vancouver, WA 98661
Attorney for Plaintiffs Hopkins

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
MAR 07 1994
JAMES R. LARSEN, CLERK
DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et. al., et. ux., Plaintiffs, v. GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation, Defendants.	NO. 92-CS-0081-FVS PLAINTIFFS' LISTS OF CLAIMS, THEORIES OF LIABILITY, AND IDENTITY OF EXPERTS WHO WILL BE CALLED

EXHIBIT B
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS JOHN HOPKINS AND RUTH HOPKINS

I. PREAMBLE

Pursuant to order of the Court dated February 24, 1994, and filed on February 25, 1994, the Plaintiffs hereby list each claim against the Defendants, including all theories of liability or causation; and identifying each expert who will be called to testify concerning these claims and theories.

It should be noted that the Defendants have not challenged all of Plaintiffs' experts. Contrary to footnote 3 of the Court's order found on page 7, there are numerous other experts who have been identified by Plaintiffs, and will be called to testify, but who have not been challenged by the Defendants under Daubert v. Merrell Dow. At hearing on this matter, the Defendants identified three additional experts that they were challenging under the Daubert tests, Dr. Milham, and Mr. Estey and Breysee. Plaintiffs have supplemented the record with offers of proof as to these witnesses.

In addition, Plaintiffs will call other experts, which include all of the pulmonologists (who will testify as to the injuries caused to Plaintiffs by the unprotected exposure to chemicals provided by the Defendants), as well as "damage" experts who will testify to the care and treatment of Plaintiffs. These include all of the pulmonologists (who will testify as to the injuries caused to Plaintiffs by the unprotected exposure to chemicals provided by the Defendants), as well as "damage" experts who will testify to the care and treatment of Plaintiffs. These witnesses include Drs. Keppel, Ostrow, Corlett, Chapman, Colistro, Herdner, and Feldstein; and Greg Charboneau, Ed.D.; Deborah Lapoint, Bill Meehan, and Diane Nebel. None of these doctors or persons have been challenged by Defendants as being unqualified or their opinions challenged. No response is made here, nor have any proofs, concerning these individuals, been filed by Plaintiffs. It should be noted that these doctors and persons (with the exception of D. N. Lapoint) have been deposed and their opinions and matters upon which they will testify have been long known by the Defendants.

II. LIABILITY CLAIMS AGAINST DEFENDANT GENERAL ELECTRIC

Plaintiffs claim that General Electric (GE), as a general contractor for the clean-up of PCB contaminants at the Kaiser Aluminum Trentwood Plant in Spokane, Washington, breached a variety of duties owed to the Plaintiffs, (who are employees of QPI, a subcontractor of GE). These breaches of duties included:

(1) the negligent failure to provide a safe work place for the workers;

(2) the negligent failure to provide the workers with appropriate safety gear;

(3) the negligent failure to provide proper ventilation in the work area;

(4) the negligent failure to provide proper training to the workers;

(5) the negligent failure to warn the workers of the dangers of the chemicals being used;

(6) the negligent failure to provide competent management and supervisory personnel;

(7) the negligent performance of the cleanup;

(8) the negligent use of hazardous chemicals;

(9) the negligent failure to monitor and evaluate work site and worker toxicity;

(10) and otherwise failing to provide for the safety of the workers in this enclosed, below ground, work place;

(11) the negligent failure of the defendants to follow state and federal statutes and regulations applicable to the use of chemicals; and

(12) the negligent failure of the defendants to follow the suggested safety procedures as set forth in the MSDS's of each chemical used.

Additionally, the Plaintiffs contend that as a result of their unprotected exposure to these chemicals that they were injured. The nature of the injuries are, in general, brain injuries (also known as "toxic encephalopathy"), pulmonary injuries, and a variety of other ills that are known to occur with unprotected exposures to these particular chemicals.

Plaintiffs will prove liability through the following means: The testimony of Peter Breysee, Samuel Milham, William Morton, and Daniel Goldstein will discuss the effects of exposure to these chemicals. Plaintiffs will prove that the defendants violated numerous statues and regulations as set forth below. Plaintiffs will provide the defendants violated their own policies and procedures. The testimony of Breysee and Estey will disclose that the defendants violated health and safety standards. The testimony of Dale Haskins will concern violations of health and safety standards as well as the internal safety standards of GE. Plaintiffs will also show, through the Material Safety Data Sheets (MSDS) on each of these chemicals that failure to use these chemicals in a safe and appropriate way, produces injuries such as those suffered by the Plaintiffs.

The expert witnesses' testimony will be tied in with the testimony of the parties and lay witnesses who will report that the chemicals were not used in accordance with the safety provisions of those MSDS's, nor in accordance with the safety provisions of those MSDS's, nor in accordance with the safety standard as set forth by the applicable regulations or statues and as testified to by the experts.

Lastly, the testimony of the medical doctors and neuropsychologists will verify that the unprotected exposure to these chemicals has caused the Plaintiffs' injury.

III. THEORY OF LIABILITY AS AGAINST DEFENDANT KAISER ALUMINUM

Plaintiffs contend that the Defendant, Kaiser Aluminum (Kaiser), owed the same type of duties to the Plaintiffs as GE. Hence Kaiser's negligence springs from a violation of those duties. The same injuries are complained of against Kaiser.

IV. PROXIMATE CAUSE CLAIMS AGAINST DEFENDANTS

Plaintiffs' claim that Defendants' failures listed above, 1) caused detrimental changes in the Plaintiffs' physical,

mental and cognitive health;

2) caused aggravation of the Plaintiffs' pre-existing conditions;

3) the changes and aggravation have caused broad limitations in the Plaintiffs' abilities to function on a daily basis in all aspects of bodily functioning and daily existence;

4) the changes and aggravations have caused limitations or destroyed Plaintiffs; ability and capacities to function in daily activities and work.

Plaintiffs contend that all the Plaintiffs were injured by the Defendants failures listed above. The injuries vary in degree and nature for the various Plaintiffs.

Proximate cause should be very simple. The Plaintiffs were exposed to known toxic chemicals. As a result the Plaintiffs were poisoned. However, to link up the chain of proximate cause there are a variety of expert witnesses, who shall be testifying in their respective areas of expertise.

There was a degree of commonalty to the workers' exposure to the chemical. There were also pertinent differences between the exposures of the Plaintiffs. The Plaintiffs all had different degrees of pre-injury functioning and health, as well as individual susceptibility to the chemicals. On the basis of the foregoing there are some slight variations in the issues of causation for each Plaintiffs. There have been extensive depositions and offers of proof on the issue of causation for all the Plaintiffs. Those depositions and offers of proof are all incorporated by reference in this report to the Court.

There are potentially a variety of issues surrounding the claims of injury surrounding the broad issue of proximate cause. There are common issues on causation to all the Plaintiffs. The common issues provide an outline to the individual items for the individual Plaintiffs.

The common issues are addressed below.

1. The science of the chemicals involved is known.

a. The chemical make-up, weight, vapor pressure, By-products, break down products and metabolites of the chemicals involved are known.

b. The effects of these chemicals on the human

respiratory system, nervous system, gastrointestinal system, liver, heart, kidneys, and skin are known.

c. There has been extensive regulation by state and federal agencies as to the protection of workers based on the known science.

d. If the proper protection is not provided, the effect of these chemicals on humans is known.

2. When published materials of the Defendants are considered, there does not appear to be a dispute between the Plaintiffs and Defendants as to the general principles of causation.

3. What chemicals were present at the site are not disputed. Therefore, the physical events that occurred with unprotected exposure to the chemicals should not be disputed by the Defendants based upon the foregoing.

4. The predicate of liability is that the workers should have their respiratory system, nervous system, cardiovascular system, skin, gastrointestinal tract and other bodily organs protected from exposures to these chemicals. The duties owed by the Defendants should have been directed to protecting the worker from exposure.

a. The protection was either nonexistent or inadequate, so the plaintiffs were exposed to these chemicals.

b. The exposure to the chemicals varied as to the work performed and what chemicals the workers were working on at various times.

5. The exposure of the workers were repeated, acute exposures.

a. There were large amounts of the chemicals used in inadequately ventilated, below ground, confined areas.

b. Most of these chemicals are heavier than air.

c. Many of the chemicals were air borne therefore were breathable.

d. There was no adequate dermal protection, so the skin of the workers was directly exposed to the chemicals that they were working with.

6. The workers manifested symptoms that would be consistent with acute toxic poisoning by these chemicals at the time of exposure.

7. Although the Defendants did not provide medical monitoring for baseline data, the signs and symptoms of the workers were consistent with significant exposure to the chemicals present.

a. Based upon the amount of chemicals present, the known chemical properties of the chemicals and how the chemicals were being used, experts can express opinions as to the relative degree of exposure that the Plaintiffs had.

b. The signs and symptoms documented by the Health Department were what one would expect after a recent acute, repeated exposure to the chemicals that were present at the 1988 clean up.

c. The residual injuries the workers have are consistent with acute, repeated exposure of these chemicals.

8. In the real world a variety of professionals are involved in protecting the worker.

a. Toxicologists, occupational medicine physicians, neuropsychologists, and industrial hygienists are all involved routinely in protecting the workers.

b. Industrial hygienists, by the nature of their work, have scientific training, experience, education and background upon what the general effect will be of these chemicals on humans.

c. Neuropsychologists have knowledge, education, training and background on what effect these chemicals have on cognitive functioning, behavioral functioning and psychological functioning.

d. Medical doctors have familiarity with the effect of these chemicals on humans. Further, medical doctors in the regular courses of their practice consult and work with industrial hygienists and neuropsychologists as to the effect of these chemicals on workers.

9. There are general principles of proximate cause which apply to all of the workers.

a. The chemicals involved have known effects on the central and peripheral nervous system.

b. The effects on the central nervous system include cognitive abilities, intellectual abilities and aspects of

personality:

c. Depending upon the nature and degree of the exposure, route of exposure, and a person's individual propensities, the nervous system effects can include cognitive, intellectual, personality, peripheral damage, or any combination of the various aspects of the nervous system.

d. Any pre-existing limitations with intellectual, cognitive or personality function would be aggravated by exposure to these chemicals.

e. Persons with limitations of their intellectual, cognitive or personalities are more susceptible to a greater impact by exposure to these chemicals.

f. The level of scientific testing available does not always permit health care providers to distinguish whether an injury to the nervous system is damage to the central nervous system or to the peripheral nervous system. However, the functioning is still limited whether it be central or peripheral injury.

10. The respiratory system is sensitive to many of the chemicals used at the site.

a. Pre-existing history of lung problems or smoking predispose individuals to injuries.

b. Sudden onsets of Reactive Airways Disease Syndrome is consistent with toxic exposure to these chemicals.

c. The persistent cough and respiratory problem that the Plaintiffs have are consistent with injuries to their respiratory tracts from these chemicals.

d. With Reactive Airways Disease the workers become more sensitive to other chemicals, products, foods and irritants in the environment after their respiratory tract was injured by these chemicals.

The issue of proximate cause will be presented through the testimony of the workers, lay witnesses, 30(b)6 designees, expert witnesses, investigative and treating health care providers and other types of expert witnesses.

The published material of General Electric addresses succinctly the general premises of proximate cause. Plaintiffs have extensive evidence as to General Electric's own knowledge of

the dangers of these chemicals. Below are several sections of General Electric's material that, along with the 30(b)6 testimony, will prove there is no dispute as to the general principles of proximate cause with these chemicals.

General Electric knows that the chemicals used in the clean up would cause injury when used without adequate precautions and controls. In General Electric's book from the Department of Corporate Research and Development entitled Solvents and Safety, by J. Merlin Nielsen, it has been written:

> Many industrial processes and products require the use of solvents for controlled dispersion of materials, for . . . cleaning agents. Any such use involves potential hazards . . . to personnel. Safety with solvents requires that all the hazards involved in their particular used in a plant be recognized and provided for. When solvents are needed, they must be used with adequate precautions and control, with thorough training of workers, and with continual vigilance. Casual use of solvents without understanding and control is courting disaster.

General Electric knew that there should have been air quality monitoring and medical monitoring of the workers. In General Electric's Solvents and Safety the corporation states:

> When toxic substances are used or generated in the workplace, it is necessary to determine for these substances the air-borne levels at which workers are or can be exposed during the full working day. To make such an assessment, a survey of all the materials and their quantities used in the workplace must be made; and processing which occurs, including products and byproducts, must be identified. From this information, combined with a knowledge of the workplace of the engineering controls (for

example, general ventilation rates in the work area), of job assignments, processing conditions, etc. a rough approximation can be compared with safety and health requirements, but it is usually just a beginning of the information and measurements needed.

General Electric's own MSDS's and textbook Solvents and Safety addresses foundationally the issue of proximate cause.

In Solvent and Safety General Electric states:

> The normal human body is able to cope with a single exposure to a limited amount of toxic material, but when the amount imposed on the body's defenses exceeds certain levels, the body cannot handle the problem and injury results. This threshold level for injury can differ for each toxic substance and for each individual. It also can vary for a given individual at different times depending on his metabolic situation. Illness and disease (past or current), fatigue and stress, nutritional status, the prior or simultaneous presence of other toxic substances, etc., can call affect the detoxifying mechanisms of the body. Sex and genetic factors can influence the body's ability to resist damage from certain toxic materials.
>
> The assault on the body's defenses by a toxic material may result from a single, relatively massive confrontation (acute toxicity) or from repeated or continuous contract with lower, apparently tolerable levels for a long period of time (chronic toxicity). (Emphasis added).

These admissions and others not set forth herein, should be sufficient in and of themselves to submit these issues to the trier

of fact.

V. EXPERTS WHO WILL BE CALLED TO TESTIFY REGARDING EACH CLAIM OR THEORY.

In addition to the named experts below, the Plaintiffs will rely upon the breach of various governmental administrative regulations and statutory enactments. These violations will be proven through the testimony of the Plaintiffs, Defendants' employees, answers to interrogatories, and other discovery, and deposition testimony. The regulations and statutes include:

R.C.W. 49.17.060; WAC 296-155-040(2); 29 U.S.C. 651(b); WAC 296-62-05143; WAC 296-62-05403(1),(4); 29 CFR 1910.1200(c), (e), (g), (g) 8, (h), (h)1.2; WAC 296-62-5409, 29 CFR 1910.1000 (Table Z-1.2) and its subparts; WAC 296-62-07515 (Table 1.2); WAC 296-62-7501 and its subparts; WAC 296-24-020; 296-24-073; 296-62-07005; 296-62-07107; 296-62-07109; 296-62-14501; 296-62-14503; 296-62-14505; 296-62-14507; 296-62-14517; 296-62-14529; and 296-62-11005. Rather than repeat the meaning of each of these subsections, the Court, should it so desire should review Plaintiffs' proposed instructions on these issues. As the Court is well aware, the violation of a regulation in Washington carries the same effect of negligence as any other proofs of negligence made at trial.

There are multiple Plaintiffs. The liability and proximate cause issues are vast. Below is a simple graph dividing out the various areas of testimony from experts:

NAME	STANDARDS	BREACH	GENERAL PROXIMATE CAUSE	SPECIFIC PROXIMATE CAUSE
BREYSSE	X	X		
ESTEY	X	X		
MORTON		X	X	X
GOLDSTEIN	X	X	X	X
MILHAM	X	X	X	
CRIPE			X	X
WEINS			X	X
CORLETT			X	
CHAPMAN			X	X
LANTSBERGER		X	X	X
CHARBONEAU				X
COLISTRO			X	X
HERDNER				X
KEPPEL			X	X
FELDSTEIN			X	X
BEATY			X	X
OSTROW			X	X
BYRD				X
HASKIN	X	X		
MEEHAN				X
LAPOINT				X
30(b)6	X	X	X	

EXHIBIT B
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS JOHN HOPKINS AND RUTH HOPKINS

Plaintiffs' challenged expert witnesses are:

A. **Peter A. Breysse**:

Mr. Breysse will testify in accordance with his offer of proof previously filed herein, the deposition exhibits and testimony, the records and reports of this expert previously forwarded to the defendants, and the answers to the interrogatories;

B. **Dr. Samuel Milham**:

Dr. Milham will testify in accordance with his offer of proof previously filed herein, the deposition exhibits and testimony, the records and reports of this expert previously forwarded to the defendants, and the answers to the interrogatories;

C. **Dr. William E. Morton**:

Dr. Morton will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records and reports previously provided to the defendant, and the answers to the interrogatories;

D. **Dr. Lloyd Cripe**:

Dr. Cripe will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records and reports previously provided to defendants and interrogatory answers;

E. **Dr. Robert Stanulis**:

Dr. Stanulis will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records and reports and interrogatory answer;

F. **Dr. Arthur Weins**:

Dr. Weins will testify in accordance with his offer of proof previously filed herein, his deposition testimony and exhibits, his records and reports previously provided to the defendants and the interrogatory answer;

G. **Dr. Robert Corlett**:

Dr. Corlett will testify as to the care and on-going treatment of Deborah Guaragna Williams, his deposition testimony, his records and reports (previously forwarded and obtained by the defendants, and the answers to interrogatories); (it

should be noted that Dr. Corlett was not challenged on Daubert;

H. Dr. Jean Chapman:

Dr. Chapman will testify as to the care and on-going treatment of Deborah Guaragna Williams, her deposition exhibits and testimony, her general understanding of the effect of these chemicals on the brain, respiratory system and other portions of the body, the records of this expert previously forwarded and obtained by the defendants, and the answers to interrogatories; Dr. Chapman was not challenged on Daubert issues;

I. Dr. Paula Lantsberger:

Dr. Lantsberger will testify in accordance with her offer of proof previously filed herein, her depositions exhibits and testimony, the records of this expert previously obtained and provided to the defendants and the answers to interrogatories.

J. Greg Charboneau, Ed.D.:

Mr. Charboneau will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records previously obtained and provided to the defendants, and the answers to interrogatories. Mr. Charboneau was not challenged on Daubert issues;

K. Dr. Colistro:

Dr. Colistro will testify in accordance with his deposition testimony, and the answers to interrogatories;

L. Dr. Herdner:

Dr. Herdner will testify in accordance with his report previously provided to the defendants as part of his role as an independent medical examiner for the Department of Labor and Industries. Dr. Herdner was not challenged on Daubert issues;

M. Dr. Keppel:

Dr. Keppel is the pulmonologist who will testify that the chemicals used have caused permanent injuries to Deborah Guaragna Williams and Ruth and John Hopkins. He will further testify to the degree of such disability, the mechanics, and the treatment for, said injuries, and in accordance with his deposition testimony, his records previously provided to the defendants and the answers to interrogatories. Dr. Keppel has not been challenged by defendants. His deposition has been taken on two occasions.

N. Dr. Feldstein:

Dr. Feldstein is the head of occupational medicine at Kaiser Permanente in Portland, Oregon. Dr. Feldstein will testify as to the treatment of Deborah Guaragna Williams, John Hopkins, and Ruth Hopkins and her opinion that the injuries they suffered to their memories, and pulmonary system are compatible with an exposure to industrial solvents, in accordance with deposition exhibits and testimony, the records of this expert previously provided to the defendants, and the answers to interrogatories. Dr. Feldstein has not been challenged on Daubert issues.

O. Dr. Beaty:

Dr. Beaty will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, the records of this expert previously obtained and provided to the defendants, and the answers to interrogatories.

P. Dr. Goldstein:

Dr. Goldstein will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, his records previously provided to the defendants, and the answers to interrogatories.

Q. L. Joseph Estey:

Mr. Estey will testify in accordance with his offer of proof previously filed herein, his deposition exhibits and testimony, the records of this expert, and the answers to interrogatories.

R. Dr. Ostrow:

Dr. Ostrow is the pulmonologist who will testify that the chemicals used have caused permanent injuries to Deborah Guaragna Williams and Ruth and John Hopkins. He will further testify to the degree of such disability, the mechanics, and the treatment for, said injuries. Dr. Ostrow has not been challenged by the defendants. His deposition testimony has been scheduled, but not taken. His records and reports have been provided to the defendants.

S. Dr. Byrd:

Dr. Byrd is a pulmonologist who will testify regarding Ruth Hopkins' hospitalization for 3-4 days in December, 1988, following her exposure at the Kaiser Trentwood plant. Dr. Byrd has been deposed and his records provided to the defendants and the substance of his knowledge and testimony regarding his dealings with Ruth Hopkins are known to the defendants. Dr. Byrd has not been challenged by the defendants.

T. Bill Meehan:

Mr. Meehan is an educator. He will testify as to school testing and Indian cultural aspects of grades and testimony.

In addition to the above, Plaintiffs will call Diane Nebel, Dale Haskins, Deborah Lapoint and Bill Meehan. There is an offer of proof on file for Ms. Lapoint. These persons qualify as experts although they are not medical doctors and have not been challenged by the Defendants pursuant to Daubert.

VI. SUPPLEMENTS TO OFFERS OF PROOF

Plaintiffs have supplemented the offers of proof for each of the persons claimed by Defendants to not meet the Daubert test.

DATED this 7th day of March, 1994.

DAWSON & MEADE

s/_____
Edward A. Dawson, WSBA 02991
Attorney for Plaintiff Carlson and for all Plaintiffs and Messrs. Schauermann and Phelan

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March 1994, true copies of an:

Plaintiffs' Lists Of Claims, Theories of Liability, and Identity of Experts Who Will Be Called,
was served on:

James B. King — **COPY HAND DELIVERED**
Keefe, King & Bowman
W. 601 Main Suite 1102
Spokane, WA 99201
Attorneys for Defendants General Electric and Kaiser Aluminum

Joe G. Hollingsworth & — **BY U.S. MAIL**
Katharine R. Latimer
SPRIGGS & HOLLINGSWORTH
1350 "I" Street N.W., 9th Fl.
Washington D.C. 20005
Attorneys for Defendants General Electric and Kaiser Aluminum

Craig F. Schauermann — **BY U.S. MAIL**
SCHAUERMANN & THAYER
1700 East Fourth Plain Blvd.
Vancouver, WA 98661
Co-counsel for Plaintiffs David Schudel, Daniel Glass, Timothy Schudel, Sandra Schudel, Kathrene Howell, Craig Thompson, and Deborah Guaragna.

Thomas C. Phelan — **BY U.S. MAIL**
806 Officers' Row
Vancouver, WA 98661
Attorney for Plaintiffs Hopkins

s/_____

Marcia M. Meade
Edward A. Dawson
Dawson & Meade
1300 W. Dean
Spokane, WA 99201-2090
(509) 328-4266

Craig F. Schauermann
Schauermann & Thayer
1700 E. Fourth Plan Blvd.
Vancouver, WA 98661
(206) 695-4244

Thomas C. Phelan
806 Officers Row
Vancouver, WA 98661
(206) 750-8750

Attorneys for Plaintiffs

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
JUN 27 1994
JAMES R. LARSEN, CLERK
DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
	)	PLAINTIFFS' MEMORANDUM ON POTENTIAL INSTRUCTIONAL ERROR BY ATTEMPTING TO DEFINE AREA OF INJURY

EXHIBIT C
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS
WILLIAMS, FROESE, GLASS, SCHUDEL(S),
THOMPSON, AND SANDY SCHUDEL 1

Plaintiffs.	)
v.	)
	)
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation.	)
Defendants.	)

PLAINTIFFS' POSITION

It is Plaintiffs' position it would be error to instruct on the individual injury contentions of the Plaintiffs. Further, it is Plaintiffs position it would be error to require specific findings of fact on the area of individual injury for individual Plaintiffs.

LAW

Throughout this litigation the Defendants have attempted to blur the law as it relates to admissibility of evidence and the burden of proof. It is anticipated the Defendants will likewise attempt to blur the distinction between admissibility of evidence with the establishment of a prima facie case sufficient to support an instruction as to the elements of damage.

The basic issue is whether Plaintiffs have prima facie evidence of injury to the body/mind of each Plaintiff. Plaintiffs have introduced evidence of such injury. (See appendix A to this memorandum.) Defendants' usual response is to say the evidence is insufficient to let the issue go to the jury. Plaintiffs have previously addressed to the Court that challenges to such evidence goes to weight and not admissibility.

For example, a jury can weigh the credentials of Dr. Lantsberger against those of Dr. Bruya as to pulmonary injuries. Plaintiffs are entitled to have the individual place whatever weight he or she chooses on the education, knowledge, experience and

skill of these witnesses. An individual juror may choose to place all the weight on the credentials of a witness; while another juror may choose to place equal weight on credentials and sources of information considered. Under the law, either method of weighing the evidence is acceptable. All the law requires the jurors to do is to discuss and consider all evidence before reaching a decision. See Court's Proposed Instruction nos. 35 and 33.

Under Court's Instruction nos. 33 and 35 one juror may individually determine one Plaintiff has emotional suffering from exclusively a psychological stand point. Another juror may individually determine the same Plaintiff has emotional suffering due to a psychological reaction to a physical problem. After discussion and consideration, all the law requires the jury to do is to agree on whether that Plaintiff was injured by the exposure to toxic chemicals at the 1988 PCB cleanup. A jury is not required to agree that the injury occurred in a certain manner or that the injury was all psychological or a combination of psychological/physical factors.

A similar analysis could be performed on the question of memory loss. Some of the jurors may believe a Plaintiff's memory loss is due to a brain injury. Other jurors may believe the memory loss is due to depression over being physically limited by pain and respiratory problems. All the jurors have to agree on is that the Plaintiff was injured. The jurors are not required to agree as to the injury being solely psychological, physical or both.

Individual injury contentions should not be listed in the instructions or in the special verdict form. A listing of the health contentions would mislead the jury as to its function and responsibilities under the law. cf State v. Hayes, 73 Wn.2d 568, 572, 439 P.2d 978 (1968). The jury's responsibility is to find duty, breach and damages. "The test in this situation is not a matter of semantics, but whether the jury was mislead as to its function and responsibilities under the law." Id., 572. Plaintiffs' Proposed instructions nos. 49, 50, 51 are correct statements of the law.[1] Under the law, it is the jury's responsibility to determine

---

[1] Plaintiffs understand that these instructions need to be modified to reflect, which Plaintiffs are recoving for which elements of damages. For example

whether Plaintiffs have proven that each individual Plaintiff was injured. It is not the jury's responsibility to make a factual finding as to whether the injuries were psychological or physiological. Likewise it is not the jury's responsibility to determine whether a memory loss is from brain injury or depression. It is the jury's responsibility to determine whether a Plaintiff's memory loss, pulmonary complaints, depression, etc., was probably caused by the negligent exposure to chemicals in 1988 during the PCB clean-up.

Respectfully submitted this 26th day of June, 1994.

DAWSON & MEADE

s/_____
Marcia M. Meade, WSBA #11122
Attorney for Plaintiff Carlson

SCHAUERMANN & THAYER

s/_____
Craig F. Schauermann, WSBA #7396
Attorney for Plaintiffs Schudel, Glass, Howell, Thompson and Guaragna

THOMAS C. PHELAN

s/_____
Thomas C. Phelan, WSBA #11373
Attorney for Plaintiffs Hopkins

Craig Thompson does not have a claim for earning capacity loss.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 1994, true copies of:

Plaintiffs' Memorandum on Potential Instructional Error by Attempting to Define Area of Injury

was served on the following:

James B. King — **HAND DELIVERED**
Keefe, King & Bowman
1102 Washington Mutual Building
W. 601 Riverside
Spokane, WA 99201
Attorney for Defendants General Electric and Kaiser Aluminum

Joe G. Hollingsworth & — **HAND DELIVERED**
Katharine R. Latimer
Spriggs & Hollingsworth
1350 "I" St., N.W., 9th Floor
Washington D.C. 20005
Attorneys for Defendants General Electric and Kaiser Aluminum

s/Marcia M. Meade

INSTRUCTION NO. 28

It is a duty of the Court to instruct you as to the measure of damages in regard to the following plaintiffs:

Timothy Schudel, and
Sandra Schudel, husband and wife,
John Hopkins, and
Ruth Hopkins, husband and wife.

By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for a particular plaintiff, then you must determine the amount of money which will reasonably and fairly compensate that plaintiff for such damages as you find were proximately caused by the fault of defendants.

As to the plaintiffs, Timothy Schudel, John Hopkins, and Ruth Hopkins, you should consider all of the following past economic damages elements:

1. The reasonable value of necessary medical care, treatment and services received to the present time;
2. The reasonable value of earnings, salaries and earning opportunities lost to the present time; and
3. The reasonable value of necessary household services, other than medical, required to the present time.

In addition, you should consider the following future economic damages elements:

1. The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;
2. The reasonable value of earning capacity and employment opportunities which with reasonable probability will be lost in the future; and
3. The reasonable value of necessary household services and expenses which with reasonable probability will be required in the future.

In addition, you should consider the following non-economic damages elements for Tim Schudel, John Hopkins, and Ruth Hopkins.

EXHIBIT C
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS
WILLIAMS, FROESE, GLASS, SCHUDEL(S),
THOMPSON, AND SANDY SCHUDEL 1

1. The nature and extent of the injuries;
2. The disability and loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future; and
3. The mental, physical, and emotional pain and suffering experienced, and which with reasonable probability, will be experienced in the future.

If you find for the plaintiff, Timothy Schudel, you should also consider the following elements of damage to his wife, Sandra Schudel. In the law, these elements of damage are called loss of consortium.

1. The reasonable value of the loss of the spouse's love, companionship, comfort, affection, society, solace or moral support lost or with reasonable probability to be lost in the future;
2. The reasonable value of loss of physical assistance in the operation and maintenance of the home lost or with reasonable probability to be lost in the future;
3. The reasonable value of loss of enjoyment of sexual relations suffered both in the past and with reasonable probability to be suffered in the future.

Similarly as to the plaintiffs John Hopkins and Ruth Hopkins, if you find for either or both of them, you should consider the same elements of loss of consortium.

The burden of proving damages rests with the party claiming them, and it is for you to determine whether any particular element has been
proved by a preponderance of the evidence.

The law has not furnished us with any fixed standards by which to measure pain, suffering, loss of enjoyment of life, or disability. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 29

It is a duty of the Court to instruct you as to the measure of damages in regard to the following plaintiffs:

Merlin Carlson,
Daniel Glass,
Deborah Guaragna Williams
Kathrene Froese, and
David Schudel.

By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for a particular plaintiff, then you must determine the amount of money which will reasonably and fairly compensate that plaintiff for such damages as you find were proximately caused by the fault of defendants.

As to the plaintiffs Merlin Carlson, Daniel Glass, Deborah Guaragna Williams, Kathrene Froese, and David Schudel, you should consider all of the following past economic damages elements:

1. The reasonable value of necessary medical care, treatment and services received to the present time;

2. The reasonable value of earnings, salaries and earning opportunities lost to the present time; and

3. The reasonable value of necessary household services, other than medical, required to the present time.

In addition, you should consider the following future economic damages elements:

1. The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;

2. The reasonable value of earning capacity and employment opportunities which with reasonable probability will be lost in the future; and

3. The reasonable value of necessary household services and expenses which with reasonable probability will be required in the future.

In addition, you should consider the following

non-economic damages elements:

1. The nature and extent of the injuries;

2. The disability and loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future; and

3. The mental, physical, and emotional pain and suffering experienced, and which with reasonable probability, will be experienced in the future.

The burden of proving damages rests with the party claiming them, and it is for you to determine whether any particular element has been proved by a preponderance of the evidence.

The law has not furnished us with any fixed standards by which to measure pain, suffering, loss of enjoyment of life, or disability. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 31

You are instructed that lost earnings are different from a loss of future capacity to earn.

Impairment to the plaintiff's future earning capacity is established when a plaintiff proves that one or both of the defendants caused an injury which lessens or reduces his or her future money- making faculties or income potential.

In determining any future impairment to the Plaintiff's earning capacity, you should consider age; the nature of the injuries, plaintiff's work capabilities in the future compared to his or her capability before the occurrence. If the plaintiff proves that one or both of the defendants caused his or her injury, and the plaintiff proves that he or she is unable to work as well as that plaintiff could before the injury, that plaintiff is entitled to compensation for impairment of his or her earning capacity.

INSTRUCTION NO. 32

According to the mortality tables, the average expectancy of life of each of the Plaintiffs is as follows:

NAME	DATE OF BIRTH	LIFE EXPECTANCY
Merlin Carlson	09/04/65	45 years
Daniel Glass	12/09/60	40 years
Kathrene Howell Froese	03/08/56	40 years
Deborah Guaragna-Williams	08/23/61	46 years
Ruth Hopkins	05/24/45	32 years
John Hopkins	11/19/46	28 years
Craig Thompson	10/02/62	42 years
David Schudel	05/19/62	42 years
Timothy Schudel	03/15/60	40 years

This one factor is not controlling, but is to be considered in connection with all of the other evidence bearing on the same question, such as that pertaining to the health, habits, and activities of the person whose life expectancy is in question.

INSTRUCTION NO. 33

If you find that before this occurrence a plaintiff had a pre-existing bodily condition which made the plaintiff more subject to injury than a person in normal health, then you should consider all injuries and damages which were proximately caused by the occurrence, even though those injuries, due to that condition, may have been greater than those which would have been suffered by normal person under the same circumstances. There may be no recovery, however, for any results which would have normally followed from the pre-existing conditions had there been no occurrence.

INSTRUCTION NO. 34

If you find for more than one plaintiff, you should assess the damages of each separately.

James B. King
Keefe, King & Bowman, P.S.
Attorneys at Law
W. 601 Main Avenue, #1102
Spokane, WA 99201
509/624-8988

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF
WASHINGTON
JUL 27 1994
JAMES R. LARSEN,
CLERK _____DEPUTY

Joe G. Hollingsworth
Spriggs & Hollingsworth
1350 I Street, NW, Ninth Flr.
Washington, DC 20005
202/898-5842
Attorneys for Defendant General Electric Co.
and Kaiser Aluminum and Chemical Corp.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
Plaintiffs,	)	DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW
v.	)	(FED.R.CIV.P. 50 (B))
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign	)	

EXHIBIT C
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS
WILLIAMS, FROESE, GLASS, SCHUDEL(S),
THOMPSON, AND SANDY SCHUDEL 1

corporation,)
)
Defendants.)

Pursuant to Fed. R. Civ. P. 50(b), defendants the General Electric Company ("General Electric") and Kaiser Aluminum Corporation ("Kaiser") renew their motion for judgment as a matter of law against each plaintiff.

In support of this Motion, Defendants refer the Court to the accompanying Memorandum In Support of Renewed Motion for Judgment as a Matter of Law (Fed. R. Civ. P. 50(b)).

DATED this 27th day of July, 1994.

KEEFE, KING & BOWMAN, P.S.

By s/_____
JAMES B. KING
WSBA No. 8723

SPRIGGS & HOLLINGSWORTH

By s/_____
JOE G. HOLLINGSWORTH

Attorneys for Defendants
General Electric Company and
Kaiser Aluminum and Chemical Corp.

JAMES B. KING
KEEFE, KING & BOWMAN, P.S.
Attorneys at Law
W. 601 Main Avenue, #1102
Spokane, WA 99201
509/624-8988

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF
WASHINGTON
JUL 27 1994
_____DEPUTY

JOE G. HOLLINGSWORTH
SPRIGGS & HOLLINGSWORTH
1350 I Street, NW, Ninth Flr.
Washington, DC 20005
202/898-5842

Attorneys for Defendant General Electric Co.
and Kaiser Aluminum and Chemical Corp.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof.	)	NO. CS-92-0081-FVS
Plaintiffs,	)	DEFENDANTS' MOTION FOR NEW TRIAL OR ALTERNATIVE RELIEF (FED.R.CIV.P. 59)
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation;	)	

EXHIBIT C
SUMMARY OF CLAIMS OF INJURY FOR PLAINTIFFS
WILLIAMS, FROESE, GLASS, SCHUDEL(S),
THOMPSON, AND SANDY SCHUDEL 1

and KAISER ALUMINUM)
CORPORATION, a foreign)
corporation,)
)
Defendants.)

Pursuant to Fed. R. Civ. P. 59, and as an alternative to judgement as a matter of law under Fed. R. Civ. P. 50(b), defendants the General Electric Company and Kaiser Aluminum Corporation move for a new trial or alternative relief.

In support of this Motion, Defendants refer the Court to the accompanying Memorandum In Support of Motion for New Trial or Alternative Relief (Fed. R. Civ. P. 59).

DATED this 27 day of July, 1994.

KEEFE, KING & BOWMAN, P.S.

By s/_____
JAMES B. KING
WSBA No. 8723

SPRIGGS & HOLLINGSWORTH

By s/_____
JOE G. HOLLINGSWORTH

Attorneys for Defendants
General Electric Company and
Kaiser Aluminum and Chemical Corp.

Marcia M. Meade
Edward A. Dawson
Dawson & Meade
1300 W. Dean
Spokane, WA 99201-2090
(509) 328-4266

Craig F. Schauermann
Schauermann & Thayer
1700 E. Fourth Plan Blvd.
Vancouver, WA 98661
(206) 695-4244

Thomas C. Phelan
806 Officers Row
Vancouver, WA 98661
(206) 750-8750

Attorneys for Plaintiffs

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
DEC 09 1994
JAMES R. LARSEN, CLERK
DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
	)	
	)	
	)	MOTION THAT THE ORDER OF NOVEMBER 25, 1994, IS A FINAL DECISION AND THERE IS NO JUST REASON FOR DELAY
	)	
	)	
	)	
Plaintiffs,	)	

v.)
)
GENERAL ELECTRIC)
COMPANY, a foreign corporation;)
and KAISER ALUMINUM)
CORPORATION, a foreign)
corporation.)
Defendants.)

COMES NOW the Plaintiffs and move the Court for a finding pursuant FRCP 54 that the order of November 25, 1994 is a final decision and there is no just reason for delay. This motion is based upon the files and records herein and the attached Affidavit.

DATED this 9th day of December, 1994.

DAWSON & MEADE

S/_____
Edward A. Dawson,
Attorney for Plaintiff Carlson

SCHAUERMANN & THAYER

S/_____
Signed with authority for:
Craig F. Schauermann, WSBA #7396
Attorney for Plaintiffs Schudel,
Glass, Howell, Thompson &
Guaragna

S/_____
Signed with authority for:
Thomas C. Phelan, 11373
Attorney for Plaintiffs Hopkins

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 1994, true copies of the:

. Motion That The Order Of November 25, 1994, Is A Final Decision And There Is No Just Reason For Delay;

. Affidavit of Edward A. Dawson; and

. Plaintiff Notice of Hearing,

was served on the following:

James B. King — **HAND DELIVERED**
Keefe, King & Bowman
1102 Washington Mutual Building
W. 601 Riverside
Spokane, WA 99201
Attorney for Defendants General Electric and Kaiser Aluminum

Joe G. Hollingsworth & — **U.S. MAIL**
Katharine R. Latimer
Spriggs & Hollingsworth
1350 "I" St., N.W., 9th Floor
Washington D.C. 20005
Attorneys for Defendants General Electric and Kaiser Aluminum

S/_____
Tonya Wylie

Marcia M. Meade
Edward A. Dawson
Dawson & Meade
1300 W. Dean
Spokane, WA 99201-2090
(509) 328-4266

Craig F. Schauermann
Schauermann & Thayer
1700 E. Fourth Plan Blvd
Vancouver, WA 98661
(206) 695-4244

Thomas C. Phelan
Attorney at Law
806 Officers Row
Vancouver, WA 98661
(206) 750-8750
Attorneys for Plaintiffs

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
DEC 29 1994
JAMES R. LARSEN, CLERK
DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, DANIEL GLASS, MERLIN E. CARLSON, TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof, KATHRENE RAE HOWELL, CRAIG A. THOMPSON, DEBORAH GUARAGNA, and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
	)	PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO FRCP 54(b) LANGUAGE
Plaintiffs.	)	

v.	)
	)
GENERAL ELECTRIC	)
COMPANY, a foreign corporation;	)
and KAISER ALUMINUM	)
CORPORATION, a foreign	)
corporation,	)
Defendants.	)

PERTINENT FACTS TO FRCP 54(B)

When this action was filed, it was filed as a negligence claim for all of the Plaintiff-Workers. On February 28, 1994 the Court ordered the Plaintiffs to:

. . . (a) list each claim against the Defendants, including all theories of liability, or causation . . .[2] In complying with the Court's Order, the Plaintiffs did on March 7, 1994[3], file with the Court a listing that all Plaintiffs were making a claim for negligence. Thereafter, the Plaintiffs listed approximately 12 theories of liability for negligence. In that pleading, the Plaintiffs listed over 10 pages their theories of causation as to the Plaintiffs' injuries arising out of negligence.[4]

At the time of instructing the jury, the Court asked that the Plaintiffs provide a list of the damages contended by the Plaintiffs. The Plaintiffs provided the Court with lists for each Plaintiff.[5] The Plaintiffs also filed with the Court a Memorandum addressing their exceptions to the placing of factual contentions rather than the legal damage elements in the jury's instructions.[6]

Neither General Electric nor Kaiser Aluminum ever presented the Court with a request for a special verdict form as to the individual damages for each Plaintiff. Nor did Defendants, under FRCP 49(a), request special interrogatories as to factual

---

[2]See the Court Order of February 28, 1994, p. 7 16-17.

[3]See Plaintiffs' Lists of Claims, Theories of Liability, and Identity of Experts Who Will Be Called, said pleading also contained causation theories.

[4]See footnote 2 supra at p. 4 through 10.

[5]See the Affidavit of Marcia M. Meade on Responding to Opposition to FRCP 54(b) Findings.

[6]See Plaintiffs' Memorandum on Potential Instructional Error by Attempting to Define Area of Injury.

contentions. Plaintiffs understood under FRCP 49(a) it was General Electric's or Kaiser Aluminum's burden to request such a special interrogatory.

More than four months after the judgment on the verdict, the District Court has granted a new trial sua sponte because of an alleged instructional errors.

Plaintiffs have contended the District Court did not have jurisdiction to decide post-trial motions, because the motions were not timely served.

SHORT ANSWER

There are five basis for finding that the Order for a New Trial are final. The basis are:

1. There is a challenge as to the trial court's jurisdiction to hear post-trial motions;

2. Four months after the entry of the judgment on the verdict, the trial court sua sponte granted a new trial because of alleged errors in instructions to the jury;

3. The Defendants have waived any right to challenge the general verdict for failure to request special interrogatories under FRCP 49(a);

4. There is but one claim by the Plaintiffs that is negligence; and

5. By looking at the substantial effect of the new trial in light of the other rulings which are appealable as a matter of right, it should be found that the New Trial Order is final under the auspices of FRCP 54(b).

Should the Plaintiffs prevail on any one of the matters above, a question of a new trial will be moot. For the original verdict will be reinstated as to all of these Plaintiffs, thereby making a second trial unnecessary.

LAW

Plaintiffs' "Complaint" and position throughout the pendency of this litigation has been that there has been a negligence claim for each Plaintiff-Worker. Under Washington law the essential elements of an actionable claim for negligence are: "(1) the existence of a duty owed to the complaining party; (2)

a breach thereof; (3) a resulting injury; and (4) a proximate cause between the claimed breach and the resulting injury." Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). Throughout this litigation Defendants have persisted in denominating an element of a negligence claim as a separate claim. Yet, under Washington law an injury standing alone is merely an element of a claim of negligence. Each injury to a part of a body is not a separate claim, but rather a factual basis of one element of negligence.

In attempting to support their position that the order for a new trial is not final, Defendants cite Eaton v. National Steel Products, 624 F.2d 863 (1980). Eaton noted that an order for a new trial is considered final, when at 864:

> Though an exception to this rule has been recognized when the District Court grants a new trial when it has no jurisdiction to do so. . .

Plaintiffs have contended the trial court did not and does not have jurisdiction to hear FRCP 50(b) and 59 motions. As early as 1886, the United States Supreme Court has recognized that when an order granting a new trial, which normally would be interlocutory, is treated as an appealable final order, when there is a challenge to jurisdiction. See Phillips v. Negley, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013 (1886). Also see Stradley v. Cortez, 518 F.2d 488, 491 (1975).

At trial neither General Electric nor Kaiser Aluminum objected to the Verdict Form and interrogatories as finally propounded to the jury. Neither General Electric nor Kaiser Aluminum proposed special interrogatories under FRCP 49(a). The failure to request a special verdict form as to each factual theory in a case results in a failure to present appropriate records for review for challenge of sufficiency of evidence to support the Plaintiffs' claim as to damage. McCord v. McGuire, 873 F.2d 1271, 1274 (9th Cir. 1989). Under FRCP 49(a) it was Defendants' burden to propose special interrogatories on damages.

In post-trial rulings the trial court sua sponte proposed that special interrogatories identifying the bodily damages individually. These sua sponte rulings on alleged instructional errors occurred more than four months after the judgment on the

verdict. In a similar situation, Peterman v. Chicago, Rock Island and Pacific Railroad Co., 493 F.2d 88 (8th Cir. 1974), the District Court considered whether the jury had been adequately instructed on the proximate cause of injuries. The Peterman Court held that the District Court lacked any power to sua sponte grant a new trial because of any alleged error in the instructions to the jury. Peterman at 91.

Many of the authorities cited by the Defendants are situations in which there have been summary judgment proceedings dismissing portions of the party's claims. The present case occurred after a trial. In those circumstances where the court has held that the granting of a new trial is not an appealable order, there are other circumstances that are considered at those times. Those circumstances consider whether there has been a motion for a remittitur. In the present case there was no motion for a remittitur. There are case where the court has found the damages awarded to the Plaintiff are inadequate. Here, the Defendants have suggested that there be no damages at all. Neither Defendants or Plaintiffs have placed the present jury verdicts at issue. Should the Plaintiffs prevail on appeal, there will be no need for a further trial.

In Tagupa v. East-West Center, Inc., 642 F.2d 1127 (9th Cir. 1980), the question of appealability of interlocutory orders was considered. There the Court advised "we look to the substantial effect rather than its terminology." Id. at 1129. The substantial effect of what the Court has ordered, if it is not treated as a final order, could result in three more trials, rather than at most two more trials. If this is found to be a final order for purposes of appealability, then the most that would occur would be two more trials. There is a high likelihood, given the jurisdictional issues on service of the post-trial motions, and the sua sponte rulings, that this matter will be disposed of with the original trial.

CONCLUSION

In the interest of judicial economy and in the interest of the practical economics of all the parties involved, this should be treated as a final order.

Respectfully submitted this 28th day of December, 1994.

DAWSON & MEADE

s/_____
Marcia M. Meade, WSBA #11122
Attorney for Plaintiff Carlson
and on behalf of Craig F.
Schauermann and Thomas Phelan
for their respective clients

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 1994, true copies of:

Plaintiffs' Reply to Defendants' Opposition to FRCP 54(b) Language

was served on the following:

James B. King — **U.S. MAIL**
Keefe, King & Bowman
1102 Washington Mutual Building
W. 601 Riverside
Spokane, WA 99201
Attorney for Defendants General Electric and Kaiser Aluminum

Joe G. Hollingsworth & — **U.S. MAIL**
Katharine R. Latimer
Spriggs & Hollingsworth
1350 "I" St., N.W., 9th Floor
Washington D.C. 20005
Attorneys for Defendants General Electric and Kaiser Aluminum

s/Marcia M. Meade

Marcia M. Meade
Edward A. Dawson
Dawson & Meade
1300 W. Dean
Spokane, WA 99201-2090
(509) 328-4266

Craig F. Schauermann
Schauermann & Thayer
1700 E. Fourth Plan Blvd
Vancouver, WA 98661
(206) 695-4244

Thomas C. Phelan
806 Officers Row
Vancouver, WA 98661
(206) 750-8750

Attorneys for Plaintiffs

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
DEC 28 1994
JAMES R. LARSEN, CLERK
DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NO. CS-92-0081-FVS
Plaintiffs,	)	AFFIDAVIT OF MARCIA M. MEADE IN RESPONSE TO DEFENDANTS' OPPOSITION TO THE FRCP 54(b) LANGUAGE

v.)
)
GENERAL ELECTRIC)
COMPANY, a foreign corporation;)
and KAISER ALUMINUM)
CORPORATION, a foreign)
corporation,)
Defendants.)

STATE OF WASHINGTON)
):ss
County of Spokane)

Marcia M. Meade, being first duly sworn on oath, deposes and says:

1. I am counsel of record. The following documents are pertinent to Defendants' opposition to the Court finding this to be a final decision as to all of the Plaintiffs under FRCP 54(b).

2. On February 28, 1994, the Court ordered Plaintiffs "it is hereby ordered: 1. By March 7, 1994, the Plaintiffs shall do the following: (a) list each claim against the Defendants, including all theories of liability or causation.. .(emphasis added).

3. In complying with that Order, the Plaintiffs filed with the Court a 19 page pleading entitled "Plaintiffs' List of Claims, Theories of Liability, and Identity of Experts Who Will Be Called" on March 7, 1994. This pleading also listed Plaintiffs' theories of causation.

4. The above document listed that the Plaintiffs were making a claim as to negligence. There were approximately 12 different theories of the claim of negligence. Thereafter, for ten pages the Plaintiffs identified their theories of proximate cause.

5. The Plaintiffs also identified that they filed extensive offers of proof as to the witnesses, who would be testifying on the issues of causation as it related to the Plaintiff-Workers.

6. At the time of jury instructions, the Court asked the Plaintiffs to provide it with a list of what each Plaintiff was contending their damages to be.

7. The Plaintiffs did provide to the Court responses to each. See attached Exhibits A, B, and C. Plaintiffs counsel also identified in memorandum their exception and authorities as to it

being error to instruct on individual factual components of damages.

8. At all times Plaintiffs have identified their negligence claim as they understood Washington's CR 8(a) and FRCP 8(a) have denominated a claim to be.

9. Affiant has always understood the law to be that damages are an element of a claim. Further that a damage element, alone, does not constitute a claim.

s/_____
Marcia M. Meade

SUBSCRIBED AND SWORN to before me this 28 day of December, 1994.

s/ Lisa Keller
NOTARY PUBLIC in and for the State of Washington residing in Spokane.
Commission Expires: 6/28/98.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 1994, true copies of:

Affidavit of Marcia M. Meade in Response to Defendants' Opposition To The FRCP 54(b) Language

was served on the following:

James B. King — **U.S. MAIL**
Keefe, King & Bowman
1102 Washington Mutual Building
W. 601 Riverside
Spokane, WA 99201
Attorney for Defendants General Electric and Kaiser Aluminum

Joe G. Hollingsworth & — **U.S. MAIL**
Katharine R. Latimer
Spriggs & Hollingsworth
1350 "I" St., N.W., 9th Floor
Washington D.C. 20005
Attorneys for Defendants General Electric and Kaiser Aluminum

s/ Marcia M. Meade

Marcia M. Meade
DAWSON & MEADE
1300 W. Dean
Spokane, WA 99201-2090
(509) 328-4266
Attorneys for Plaintiffs

Thomas C. Phelan
Attorney at Law
806 Officer's Row
Vancouver, WA 98661

Craig F. Schauermann
SCHAUERMANN & THAYER
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et al., et ux.,	)	
Plaintiffs,	)	NO. 92-CS-0081-FVS
v.	)	
	)	PLAINTIFFS'
GENERAL ELECTRIC COMPANY, et al.	)	CONTENTIONS ON MERLIN CARLSON
Defendants.	)	

COMES NOW the Plaintiffs and identify for the Court the contentions as to Merlin Carlson. It is contended that Merlin Carlson had an injury to his mind and his body at the time of the exposure. Including the present experience of alternations in consciousness, rash, breathing difficulties, coughing, headaches, nausea, vomiting. The injury to his mind and body include the development of solvent syndrome, toxic encephalopathy, memory

loss, concentration difficulties, irritability, mood swings, depression, injury to his lungs, injury to his personality and injuries to all of his organ systems which manifested as solvent syndrome, aggravation of his existent level of cognitive functioning, aggravation of his lung function, permanent respiratory problems, loss of his ability to live independently, loss of his ability to become medicine man, loss of his ability and capacity to enjoy life, loss of his ability and capacity to work, mental and physical pain and suffering.

DATED this 24 day of June, 1994.

DAWSON & MEADE

s/_____
Marcia M. Meade, WSBA #11122
Attorney for Plaintiff Carlson

Thomas C. Phelan
Attorneys at Law
806 Officers Row
Vancouver, WA 98661
(206) 750-8750
Attorneys for Plaintiffs Hopkins

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et al., et ux.,	)	
	)	
Plaintiffs,	)	No. 92-CS-0081-VS
	)	
vs.	)	
	)	
GENERAL ELECTRIC COMPANY, a	)	SUMMARY OF
foreign corporation, and KAISER	)	CLAIMS OF
ALUMINUM CORPORATION,	)	INJURIES FOR
a foreign corporation,	)	PLAINTIFFS
JOHN	)	HOPKINS AND
Defendants.	)	RUTH HOPKINS

JOHN HOPKINS and RUTH HOPKINS, by and through their attorney of record, Thomas C. Phelan, hereby sets forth their summary of claims of damages pursuant to Court Order.

A. **JOHN HOPKINS**:

1. Past medical expenses;
2. Past, present, and future emotional distress, pain and suffering due to permanent respiratory illness;
3. Loss of enjoyment of life due to permanent respiratory illness; and
4. Loss of spousal consortium.

B. **RUTH HOPKINS**:

1. Past, present, and future medical expenses;
2. Past, present, and future psychiatric and/or psychological care and treatment;
3. Past, present, and future pain and suffering and emotional distress due to respiratory illness;
4. Loss of enjoyment of life due to respiratory illness;
5. Loss of spousal consortium;

DATED this 24th day of June, 1994.

THOMAS C. PHELAN

s/_____
Thomas C. Phelan, WSBA #11373
Attorney for Plaintiffs Hopkins

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

121a

Craig F. Schauermann
SCHAUERMANN & THAYER
Attorneys at Law
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661
(206) 695-4244
Attorneys for Plaintiffs Schudel, Glass, Howell, Thompson & Guaragna

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et al., et ux.,	)
	)
Plaintiffs,	) No. 92-CS-0081-VS
	)
vs.	) SUMMARY OF
	) CLAIMS OF INJURY
GENERAL ELECTRIC, a foreign	) FOR PLAINTIFFS
corporation, and KAISER ALUMINUM	) DEBBIE WILLIAMS,
CORPORATION, a foreign	) KATHY FROESE,
corporation,	) DAN GLASS,
	) DAVID SCHUDEL,
Defendants.	) TIM SCHUDEL,
	) CRAIG THOMPSON,
	) AND SANDY
	) SCHUDEL

DEBBIE WILLIAM, KATHY FROESE, DAN GLASS, DAVID SCHUDEL, TIM SCHUDEL, CRAIG THOMPSON, and SANDY SCHUDEL, by and through their attorney of record, Craig F. Schauermann, hereby sets forth their summary of claims of damages pursuant to Court Order.

A. **DEBBIE WILLIAMS**: Permanent brain injury resulting in cognitive deficits, memory problems, loss of IQ, change in disposition, Organic Personality Syndrome, depression. Pulmonary injuries resulting in sensitivity to fumes, breathing

problems, increased susceptibility to bronchitis and other upper respiratory infections, aggravation of pre-existing problems, and Reactive Airway Disease Syndrome. Rash, dizziness, vomiting, tiredness, fear, pain and suffering, lethargy, emotional distress, medical bills, wage loss, loss of earning capacity, retraining expenses, and loss of the enjoyment of life.

B. **KATHY FROESE**: Pulmonary injuries, resulting in sensitivity to fumes, breathing problems, increased susceptibility to bronchitis and other upper respiratory infections, aggravation of pre-existing problems, Reactive Airway Disease Syndrome. Memory problems, change in disposition, headache and depression. Rash, dizziness, tiredness, lethargy, fear, pain and suffering, emotional distress, medical bills, loss of earning capacity, and loss of the enjoyment of life.

C. **DAN GLASS**: Memory loss, past and future pulmonary problems, including sensitivity to fumes, breathing problems, aggravation of pre-existing conditions, headache, rash, tiredness, lethargy, pain and suffering, irregular heart beat, emotional distress, fear, medical bills, and loss of the enjoyment of life.

D. **DAVID SCHUDEL**: Memory problems, change in disposition, depression, pulmonary injuries resulting in sensitivity to fumes, breathing problems, aggravation of pre-existing pulmonary dysfunctions, fear, headache, rash, irregular heartbeat, tiredness, lethargy, emotional distress, pain and suffering, medical bills, wage loss, retraining expenses, and loss of the enjoyment of life.

E. **TIMOTHY SCHUDEL**: Memory problems, change in disposition, depression, pulmonary injuries resulting in sensitivity to fumes, breathing problems, aggravation of pre-existing condition, fear, headache emotional distress, pain and suffering, medical bills, rash, dizziness, tiredness, lethargy, wage loss, retraining expenses, and loss of the enjoyment of life.

F. **CRAIG THOMPSON**: Memory problems, change in disposition, depression, pulmonary injuries resulting in sensitivity to fumes, breathing problems, aggravation of pre-existing condition, fear, headache, emotional distress, pain and suffering, medical bills, rash, dizziness, retraining expenses, and loss of the enjoyment of life.

G. **SANDY SCHUDEL**: Sandy Schudel contends that she has suffered a loss of consortium with her spouse.

DATED this 24th day of June, 1994.

SCHAUERMANN & THAYER

s/_____
Craig F. Schauermann, WSBA #7396
Attorney for Plaintiffs Schudel.
Glass, Howell, Thompson & Guaragna

RECEIVED
OFFICE OF THE CLERK
U.S. COURT OF APPEALS
1995 JAN 31
FILED
DOCKETED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY L. SCHUDEL and SANDRA SCHUDEL, husband and wife and the marital community composed thereof; KATHRENE RAE-HOWELL (FROESE); CRAIG A. THOMPSON; JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof. Plaintiffs-Appellees/ Cross Appellants. DEBORAH GUARAGNA (WILLIAMS). Appellee. v. GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation. Defendants-Appellants/ Cross Appellees.	Nos. 94-36250 / 95-35010 BRIEF IN SUPPORT OF MOTION TO DISMISS (WITH ATTACHMENTS)

The General Electric Company and Kaiser Aluminum and Chemical Corporation [hereinafter, collectively, "General Electric"] move to dismiss these cases on the ground that no final judgment existed at the time the parties noted their appeals. This Court therefore lacks appellate jurisdiction. See Fed. R. App. P. 4; 28 U.S.C. § 1291.

INTRODUCTION

The parties' appeals were taken from the November 25, 1994, Order of the district court which directed, on post-trial motions filed by General Electric: (1) that judgment be entered as a matter of law in favor of General Electric on the claims of four of the ten plaintiffs; (2) that a new trial be held on the claims of another four of the ten plaintiffs; and (3) that the jury verdict be upheld as to one plaintiff. See CR 571.[7] The district court Order failed to address the claims of the tenth plaintiff. See id.

As is clear from this summary, the district court's November 25 Order did not dispose of all claims of all parties. General Electric thereafter timely moved in the district court, pursuant to Fed. RS. Civ. P. 60(b) and 59(e), to alter or amend or correct the Order, in part to obtain judgment on the tenth, unaccounted for, plaintiff. CR 574, 575. General Electric also moved for certification under Fed. R. Civ. P. 54(b) so that the parties could appeal appropriate portions of the Order (i.e., those portions which fully resolved the claims of any plaintiff).[8] CR 574, 575. All plaintiffs objected to General Electric's Rule 54(b) proposal, CR 591, 592, 593, and all plaintiffs countered with their own motion for certification under Rule 54(b), CR 577, 578. (The Rule 54(b) certification dispute arose because General Electric sought certification only as to those parties whose claims

---

[7] General Electric previously filed the District Court's November 25, 1994 Order in its entirety in response to plaintiff-appellants' motion to dismiss and motion for remand.

[8] Federal Rule of Civil Procedure 54(b) provides that, In actions involving more than one claim or multiple parties, "the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

were finally resolved, while plaintiffs sought "certification" as to everyone -- even those against whom judgment was not entered but who instead faced a new trial.) In addition, two of the four plaintiffs who were ordered to submit their claims by way of a new trial moved for reconsideration or clarification of the Order pursuant to Fed. Rs. Civ. P. 60 and 59(e). CR 580, 581. While all of these motions were pending, plaintiffs -- excepting the sole prevailing plaintiff Deborah Williams -- noticed this appeal, ostensibly pursuant to Fed. R. App. P. 4. CR 584. As a protective measure, General Electric then noticed a cross-appeal. CR 589. These cross-appeals comprise the present action.

ARGUMENT

I. The Appeals Were Taken From A Non-Final Order Which Adjudicated Fewer Than All Claims And The Rights Of Fewer Than All Parties

Federal Rule of Appellate Procedure 4(a)(1), read in conjunction with the jurisdictional provisions of 28 U.S.C. § 1291, requires that the appealing party notice his appeal "within 30 days after the date of the entry of judgment." Because there was no final judgment here, the parties' appeals were not and are not ripe for review. E.g., Frank Briscoe Co. v. Morrison-Knudsen Co., 776 F.2d 1414 (9th Cir. 1985) (appeal dismissed in absence of clear Rule 54(b) findings); Baker v. Limber, 647 F.2d 912, 916 (9th Cir. 1981) (final judgment as to one, but not all, defendants was not ripe for appeal absent the express determinations required by Rule 54(b)); Chacon v. Babcock, 640 F.2d 221, 222 (9th Cir. 1981) ("[W]ithout a Rule 54(b) certification, orders granting partial summary judgment are non-final"); Sanchez v. Breed, 464 F.2d 448 (9th Cir. 1972) (dismissing appeal where failure to comply with Rule 54(b)); Atterbury v. Carpenter, 310 F.2d 126 (9th Cir. 1962) (same). Plainly, the district court's November 25 Order, to which these appeals were directed, was not a final Order under the federal rules. Accordingly, the appeals are jurisdictionally defective.

2. The Premature Appeals Are Not "Saved" By The District Court's Recent Rule 54 Certifications

On January 17, 1995, approximately four weeks after plaintiffs noticed their appeal (and General Electric its protective cross-appeal), the district court ruled on the parties' motions to alter or amend or correct the Order and motions for Rule 54 certification. CR 600. The district court directed: (1) that final judgment be entered as a matter of law in favor of General Electric on the claims of the tenth plaintiff; (2) that the parties' varied requests for alternative substantive relief be denied; (3) that final judgment be entered and Rule 54 certification issue for six plaintiffs; and (4) that no final judgment be entered for four plaintiffs, who nevertheless would have the right to appeal the limited question of the district court's jurisdiction to hear General Electric's post-trial arguments (citing Eaton v. National Steel Products Co., 624 F.2d 863, 864 (9th Cir. 1980)).[9] CR 600.[10] On the question of "judgment" as to the latter four, the Court explicitly held:

> In its order, the Court ruled that these four plaintiffs . . . could not recover damages for certain (alleged) injuries. The judgments which had been entered in their favor were vacated, and a new trial was ordered. In other words, the order limited damages, but left their negligence claims otherwise unresolved pending a new trial. As a result, insofar as Kathrene Froese, Merlin Carlson, Ruth Hopkins, and John Hopkins are concerned, the order is not a final judgment.

Order at 4-5 (emphasis added) (citation omitted).

---

[9] The Eaton exception allows the appellate court to review the authority of the district court in granting a new trial where its jurisdiction to do so is challenged, but does not permit review of the merits of that interlocutory order. See Eaton v. National Steel Products Co., 624 F.2d 863, 864 (9th Cir. 1980).

[10] General Electric previously filed the District Court's January 17, 1995 Order in its entirety as a Fed. R. App. P. 28(j) supplement in response to plaintiff-appellants' motion to dismiss and motion for remand.

All parties -- excepting again Ms. Williams -- noticed appeals from the January 17 Order and final judgment. CR 666, 669.[11] These later-filed appeals are the only jurisdictionally proper means by which to resolve the merits of the final judgment in this case. E.g., Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (timely notice of appeal is mandatory and jurisdictional); Bordallo v. Reyes, 763 F.2d 1098, 1101 (9th Cir. 1985) (same).

Plaintiff-appellants may argue that the premature appeals were somehow "validated" by the district court's subsequent Rule 54 certification and related Order. Federal Rule of Appellate Procedure 4(a)(2) provides that a "notice of appeal filed after the court announces its decision or order but before the entry of judgment or order is treated as filed on the date of and after the entry." In this case, however, the late certification did not imbue the earlier Order with finality.

The Supreme Court has made clear that Federal Rule of Appellate Procedure 4(a)(2) "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by entry of judgment." FirsTier Mortg. Co. V. Investors Mortg. Ins. Co., 498 U.S. 269, 276 (1991) (emphasis in originals). In other words, a "premature notice of appeal is valid when '[a]ll that remained was the clerk's ministerial task of entering a Rule 58 judgment.'" In re Jack Raley Construction, Inc., 17 F.3d 291, 294 (9th Cir. 1994) (dismissing appeal taken from order which did not completely adjudicate issues) (quoting American Totalisator Co. v. Fair Grounds Corp., 3 F.3d 810, 813 (5th Cir. 1993)).

Here, even if the district court had immediately entered Rule 54 certification and the clerk had immediately entered the judgment, the November 25 decision would not have been then

---

[11] The parties' newly filed Notices of Appeal are attached hereto as Exhibits 1 and 2. Plaintiffs' new Notice of Appeal is defective to the extent it purports to be an "Amended Notice" in furtherance of this appeal. CR 669. Moreover, by observing that this "Amended Notice" was filed, General Electric does not waive any objections it may have to any procedural or substantive defect in the new notice or the new appeal. Certainly, the District Court's January 17 Order defines the appealable issues far more restrictively than plaintiffs suggest.

appealable as to five of the ten plaintiffs. First, no decision or judgment whatsoever existed as to plaintiff-appellant Sandra Schudel until January 17. On November 25, she had nothing from which to appeal. Second, no final judgment existed as to plaintiff-appellants John Hopkins, Ruth Hopkins, Kathrene Froese and Merlin Carlson (the four who face a new trial). See Order of January 17 at 5 (confirming that November 25 "order [was] not a final judgment" as to the four). The grant of a new trial "is an interlocutory order not appealable as a final judgment." Eaton v. National Steel Products Co., 624 F.2d 863, 864 (9th Cir. 1980); see Roy v. Volkswagenwerk Aktgiengesellschaft, 761 F.2d 670 (9th Cir. 1985) (Order granting new trial is not appealable); Gilliland v. Lyons, 278 F.2d 56, 58 (9th Cir. 1960) (same). In short, there was and is no basis for this Court to treat the premature notices of appeal as having been timely filed pursuant to the later, final Order.

Since FirsTier, this Court has confronted jurisdictional defects which closely approximate those found here and has methodically dismissed the premature appeals. In Serine v. Peterson, 989 F.2d 371 (9th Cir. 1993), for example, plaintiffs noticed their appeal from a magistrate's recommended dismissal. The recommendation was not a final or appealable order and the notice of appeal was therefore. Although the district court later entered final judgment based on the recommended dismissal, this Court dismissed the appeal. Applying FirsTier , this Court explained that because the appealed-from order could not itself form the basis of a final judgment without further action or developments, the premature notice could not be cured by subsequent entry of judgment. 989 F.2d at 372-73. In In re Jack Raley Construction, this Court likewise dismissed an appeal taken by premature notice. 17 F.3d at 294-95. The premature notice was not valid because one issue before the district court (in that case, the question of pre-judgment interest) was not adjudicated in the order from which the appeal was taken. Id.

FirsTier and its Ninth Circuit progeny mandate dismissal here, because the district court's November 25 Order – which left the claim of one plaintiff completely unresolved and which merely ordered new trials as to another four plaintiffs – could not itself form the basis of a final judgment without further action.

3. General Electric Is Entitled To Proceed On A Jurisdictionally Correct Appeal On Those Limited Claims Certified By The District Court Or Otherwise Appealable

Although the issue raised is a jurisdictional one, General Electric also notes that the dismissal of the present appeal in favor of the later-taken one is an equitable result and is more than a bow to clerical formalities. The nine plaintiff-appellants purport to raise dozens of "issues" in this appeal, but none of the nine had a final judgment, one of the nine was not subject to judgment at all, and four of the nine are restricted to only an Eaton-based timeliness challenge. The procedural quagmire – unilaterally created by plaintiff-appellants – can best be avoided by dismissal of the premature appeals. Proper appellate procedures remain available, and there is no prejudice to any party entitled to be before this Court. See In re Jack Raley Construction, 17 F.3d at 294 ("prudent course of action is merely to file a fresh appeal after entry of final judgment").

Finally, General Electric notes that "Rule 4(a)(2) was intended to protect the unskilled litigant who [1] files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, [2] while failing to file a notice of appeal from the actual final judgment." FirsTier, 498 U.S. at 276. In this case, neither consideration exists. Plaintiffs knew the November 25 Order did not constitute an appealable final judgment; hence, plaintiffs themselves filed (but did not await resolution of) a motion for Rule 54(b) certification as well as an objection to General Electric's request for a more limited Rule 54(b) certification. CR 577, 578, 591, 592, 593. See In re Jack Raley Construction, 17 F.3d at 294 ("We are unwilling to conclude that the Appellants were lulled into the reasonable but mistaken belief that their August 13 notice of appeal was efficacious. . . . Theirs was not a casual objection to the proposed order of judgment proffered by the [Appellee]."); Serine, 989 F.2d at 372 ("Plaintiff himself betrayed his awareness of this fact by filing objections to the magistrate judge's order in the district court."). Moreover, plaintiffs have now filed what they style an "Amended Notice of Appeal" directed to the later Order. CR 669. Plaintiffs simply do not need – and are not entitled to – the "protection" of Rule 4(a)(2).

CONCLUSION

The district court did not render a decision on November 25, 1994, that either (1) was then-appealable or (2) would have been appealable if immediately followed by the entry of judgment. The notices of appeal directed to that November 25 Order were therefore premature and the jurisdictional defect was not cured by entry of the later Order. The appeals must be dismissed.

DATED this 31st day of January, 1995.

SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W. Ninth Floor
Washington, DC 20005
202/898-5800

By: s/_____
Joe G. Hollingsworth
Donald W. Fowler
Katharine R. Latimer

KEEFE, KING & BOWMAN, P.S.
Attorneys at Law
W. 601 Main Avenue Suite 1102
Spokane, WA 99201
509/624-8988

By: s/_____
James B. King

Attorneys for the General Electric Company and Kaiser Aluminum and Chemical Corporation

RECEIVED
OFFICE OF THE CLERK
U.S. COURT OF APPEALS
1995 JAN 17 PM 2:30
FILED
DOCKETED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NOS. 94-36250
	)	
	)	NO. CS-92-0081-FVS
	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	
	)	
	)	
	)	
	)	
Defendants-Appellees.	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANT CARLSON'S MOTION TO REMAND FOR LACK OF DISTRICT COURT JURISDICTION AND STAY OF SCHEDULE (FRAP 9TH CIR. 27.11)

Marcia M. Meade
Dawson & Meade
W. 1300 Dean Ave.
Spokane, WA 99201-2015
Telephone: (509) 328-4266
Attorney for Plaintiff-
Appellant Carlson

I. RELIEF SOUGHT

Appellant, Merlin Carlson, Jr., moves to remand this matter herein based on lack of District Court jurisdiction and waiver of General Electric Company and Kaiser Aluminum and Chemical Corporation to jury trial of issues and to stay the schedule pursuant to FRAP Cir. R. 27-11. Appellant moves to remand this matter to Federal District Court, Eastern District of Washington with instructions that the District Court reinstate the original judgment of July 13, 1994.

II. GROUNDS

Special interrogatories in a FRCP 49(a) verdict form were submitted without objection by the court to the jury. The jury was dismissed after it had consistently answered all the questions in the special verdict form. A judgment was entered on July 13, 1994 based upon the findings of the special verdict form. Appellees General Electric Company (G.E. herein) and Kaiser Aluminum and Chemical Corporation (Kaiser herein) neither submitted special interrogatories nor objected to the special verdict form submitted to the jury. Appellees G.E. and Kaiser have waived their right to a jury trial on a subdivision of damages. The District Court lacked jurisdiction to grant a new trial on the basis of the need for additional findings on damages under FRCP 49(a). Accord, Pau v. Yosemite Park & Curry Co., 928 F.2d 880 (9th

Cir. 1991); McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989). Under FRCP 59(d) the Court, on its own initiative, may grant a new trial for any reason that a party may have moved for a new trial. G.E. and Kaiser lacked the legal power to request, so the District Court lacked jurisdiction. Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); Peterman v. Chicago Rock Island and Pacific R. R. Co., 493 F.2d 88, 91 (8th Cir. 1974) cert. denied 94 S.Ct. 3072.

III. BASIS

This motion is based upon the files and records herein, the excerpts of the record filed contemporaneously herein, and the Memorandum of counsel.

DATED this _____ day of January, 1995.

DAWSON & MEADE

s/_____
Marcia M. Meade
Attorney for Appellant Carlson

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On January 17, 1995, I served the within

APPELLANT CARLSON'S MOTION TO REMAND FOR LACK OF DISTRICT COURT JURISDICTION AND STAY OF SCHEDULE (FRAP 9TH CIR. 27.11)

on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

James B. King
KEEFE, KING
& BOWMAN
W. 601 Main, 1102
Spokane, WA 99201

Joe G. Hollingsworth
SPRIGGS & HOLLINGSWORTH
1350 "I" St., N.W., 9th Fl.
Washington, D.C. 20005

Craig F. Schauermann
SCHAUERMANN & THAYER
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661

Thomas C. Phelan
Attorney at Law
806 Officers Row
Vancouver, WA 98661

Executed this 16th day of January, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

RECEIVED
OFFICE OF THE CLERK
U.S. COURT OF APPEALS
1995 JAN 17 PM 2:30
FILED
DOCKETED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof.	)	NOS. 94-36250
	)	
	)	NO. CS-92-0081-FVS
	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation.	)	
	)	
	)	
	)	
	)	
Defendants-Appellees.	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANT CARLSON'S MEMORANDUM IN SUPPORT OF REMAND, REINSTATEMENT OF VERDICT, AND STAY OF PROCEEDINGS UNDER CIR. R. 27-11.

Marcia M. Meade
Dawson & Meade
W. 1300 Dean Ave.
Spokane, WA 99201-2015
Telephone: (509) 328-4266
Attorney for Plaintiff-
Appellant Carlson

I. NATURE OF MEMORANDUM

Appellant Carlson submits this Memorandum in support of his Motion to remand to the District Court on the basis that the District Court lacked authority to vacate the verdict and order a new trial, and to vacate the schedule for record preparation and briefing pursuant to Cer. R. 27-11.

II. FACTS

This action was brought as a negligence action in State Court. CR 1, ER 2. Based on diversity it was removed to Federal Court. CR 1, ER 3. On February 28, 1994 the Court ordered Plaintiffs to: . . .(a) list each claim against the Defendants, including all theories of liability or causation. . . CR 326, ER 6. On March 7, 1994, Plaintiffs identified that they were making a claim for negligence. CR 327, ER 9, 10. An extensive list of Plaintiffs' theories of negligence and causation were provided. CR 327, ER 11-19.

The District Court found Merlin Carlson had sufficient evidence to support his negligence claim as it related to neurological damage. CR 327, ER 119-120. The evidence of neurological damage will be briefly addressed below, with the caveat that there was substantially more evidence than identified herein. The evidence is being identified for purposes of the application of the law of FRCP 49(a).

Merlin Carlson, along with the other Plaintiffs, was negligently exposed to hazardous chemicals. CR 476, ER 109. The exposure to hazardous chemicals occurred during a hazardous waste clean-up in Spokane, Washington. General Electric's own personnel, Dale C. Haskins, identified the plaintiff-worker's were exposed to hazardous chemicals. RT Vol. 36, ER 80-96. The jury found General Electric (hereinafter G.E.) and Kaiser Aluminum and Chemical Corporation (herein Kaiser) were negligent in exposing Merlin Carlson, Jr. CR 476, ER 109.

The exposure incident was investigated by the Washington State Health Department by Dr. Samuel Milham, Jr. and other government officials. RT Vol. 7, Exhibit 1, ER 49-50, 55-63. Dr. Milham's investigation was published in scientific peer review journal article published on this incident. Exhibit 1, ER 102-108. Dr. Milham testified as to his investigation of Merlin Carlson's injuries relative to his exposure to the hazardous chemicals. Dr. Milham identified the chemicals used were scientifically known to cause injury to human brains. Vol. 7, ER 52-53.

Dr. Daniel Goldstein testified extensively how these hazardous chemicals damage the cell structures of the human body, e.g. RT Vol. 3, ER 25-28, 34, 42-47. Dr. Goldstein testified Merlin Carlson, Jr., more probably than not, was injured by the negligent exposure to hazardous chemicals. RT Vol. 3, ER 29-33, 41, 48. Merlin Carlson's damages were very serious and affected all aspects of his life. RT 575, ER 41. There was extensive testimony from two neuropsychologists as to the effect Carlson's brain damage. RT Vol. 17, ER 66-73, Vol. 19, ER 74-75. As a result of the injury Carlson was unable to live independently. RT 312, ER 75.

Mr. Carlson had a $730,000 earning capacity loss as a result of his injury. RT Vol. 10, ER 97-99. Mr. Carlson was 24 years old at the time of the injury.

Mr. Carlson was a Blackfeet Native American. RT Vol. 22, ER 76. He had been training to be a medicine man for his tribe, since a child. As a result of his injury Mr. Carlson was no longer able to full file his desires and obligations as a medicine man for his tribe. RT Vol. 22, ER 76-79.

In addition to the evidence above there was extensive evidence through Dr. Paula Lantsberger as to her evaluation and treatment of Merlin Carlson. There was also extensive testimony as to the impact of the injuries on Mr. Carlson's day to day life. In addressing the jurisdictional issue it is not necessary for Mr. Carlson describe in detail the evidence from Dr. Lantsberger, lay witnesses and Mr. Carlson. Mr. Carlson does except and so appealed as to the District Court's finding that his evidence was insufficient as to other areas of injury.

The Court near the end of the trial asked that there be a listing of all the contentions as to the Plaintiffs. RT 11962-93. ER 100-101. Merlin Carlson's contentions were provided to the Court. CR 592, ER 121-122. The Court indicated that the contentions for Merlin Carlson were requested in connection with instructing the jury. RT 11692, ER 100.

At the close of the case approximately 5 days were spent by the Court and Plaintiffs' counsel in determining how the jury was to be instructed. At no time did Appellees G.E. or Kaiser request that there be special interrogatories propounded as to the sub-issues of damages.

The jury found in favor of Merlin Carlson on negligence. The jury made a specific factual finding as to Merlin Carlson's damages. CR 476, ER 109-110. Before the jury was released there was no request by G.E. or Kaiser that the jury subdivide the damages. A judgment in favor of Merlin Carlson was entered on July 13, 1994.

Unlike the other Plaintiffs, G.E. and Kaiser did timely serve Merlin Carlson's counsel with FRCP 50 and 59 Motions after business hours on the 10th judicial day. CR 486, 487, 488, 489, ER 110, 111, 112, 113. The tenth day, for purposes of any motion under FRCP 59, was July 27, 1994. The District Court did not provide notice under FRCP 59(d) to Merlin Carlson as to a new trial based upon the failure of jury findings on all of Carlson's theories of damages.

G.E.'s and Kaiser's post-trial Motions were based upon

twelve claimed errors of law. However, G.E. and Kaiser did not claim as error defects in the special verdict form. CR 571, ER 117-118. On November 22, 1994, the District Court sua sponte entered an order of a new trial for a factual determination as to the subdivision of damages. CR 571, ER 119-120.

III. SUMMARY OF THE ARGUMENT

The jury was dismissed after reaching a special verdict on Merlin Carlson's negligence claim on July 13, 1994. G.E. and Kaiser did not submit interrogatories, demand interrogatories, or object to the special verdict form submitted to the jury. Once the jury returned its verdicts neither G.E. nor Kaiser demand, nor did the District Court request, that the jury make additional findings before the jury was dismissed.

Under FRCP 49(a) G.E. and Kaiser waived any right to a jury trial as to a jury trial on the sub-issues of Merlin Carlson's damages. Once G.E. and Kaiser agreed to the Special Verdict form, which addressed all the basic elements of a claim of negligence and a defense of borrowed servant, Appellees-Defendants lack the power to move for a new trial for findings as to sub-issues on damages. The District Court lacked the authority to grant a new trial, when a party lacked the power to so move.

Under FRCP 56(d) the District Court lacked jurisdiction to order a new trial for determination of the sub-issues on damages. Therefore, the District Court lacked jurisdiction to order a jury trial on factual issues which have been waived by G.E. and Kaiser. This Court should remand this matter to the District Court with instructions to reinstate the judgment as to Merlin Carlson, Jr. of July 13, 1994.

IV. LAW

A. Standard of Review for Procedural Issues.

Jurisdictional issues, including issues of procedure such as a determination of whether a party waived a right to a jury trial on a sub-issue and the Court's motions under FRCP 56(d) are reviewed de novo. Westinghouse Electric Corp. v. Newman and Holzinger, P.C., 992 F.2d 932 (9th Cir. 1993); Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260, 1262 (9th Cir. 1993);

Dubbs v. C.I.A., 966 F.2d 1114, 1118 (9th Cir. 1989); see also 2 Federal Procedure, L.Ed., Appeal, Sarschory, and Review, § 3:652 (1981).

B. Motions on the Court's Own Initiative, FRCP 59(d) are Jurisdictional.

FRCP 59(d) has three jurisdictional requirements before the District Court may grant a new trial on the Court's Motion.

The first requirement is timing. The Court may grant a new trial on its own motion is within ten days of the verdict. FRCP 59(d). The second sentence of FRCP 59(d) has been read to allow the District Court the opportunity to move for a new trial if timely motions for a new trial are pending before the court. See Notes of Advisory Committee on FRCP 59(d) 1966 amendment. The second jurisdictional requirement is that the Court may grant a new trial only for reasons that a party might move for a new trial. The third requirement is that the Court give the parties notice and an opportunity to be heard.

Merlin Carlson, Jr., although not served during business hours, his counsel was timely served with Motions and Memorandum under FRCP 50 and 59. Merlin Carlson, Jr. was not timely served with notice as to the time of the hearing in violation of LR 7(c). Even if one assumes timely service on Merlin Carlson, Jr., the District Court did not have jurisdiction under FRCP 56(d) to grant a new trial to subdivide the damage issue.

G.E. and Kaiser had waived the right to a jury trial on the sub-issue of damages. Pau v. Yosemite Park and Curry Co., 928 F.2d 880, 890-91 (9th Cir. 1991). Once the jury was dismissed, after answering a special verdict form, G.E. and Kaiser had no right to a new trial on damages. McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989). If G.E. and Kaiser could not move for a new trial to address the sub-issues on damages, the jurisdictional requirement of "... for any reason for which it might have granted a new trial. . ." is absent. The District Court lost jurisdiction when G.E. and Kaiser waived the right, and therefore were barred from making motions for a new trial for determination of sub-issues on damages. Accord, Reorganized Church of Jesus Christ v. U.S. Gypsum, 882 F.2d 335, 338 (8th Cir. 1989).

The District Court failed to meet the third jurisdictional requirement of FRCP 56(d). The first Merlin Carlson, Jr. heard

of a new trial being granted to determine the sub-issues of damages was when the order of November 25, 1994, was received. Merlin Carlson, Jr. has been denied notice and an opportunity to be heard on the District Courts FRCP 56(d) motion.

The jurisdictional requirements of FRCP 59 are to be strictly construed. Brower v. Dir. Ill. Dept. of Corrections, 434 U.S. 257, 264-65, N.5, 54 L.Ed.2d 521, 98 S.Ct. 556 (1978); Peterman v. Chicago, Rock Island & Pacific Railroad Co.; and, McConnell v. Meba Medical and Benefit Plan, 778 F.2d 521, 526 (9th Cir. 1985). At a minimum two of the three jurisdictional requirements of FRCP 59(d) were lacking. The parties agreed to a special verdict form. The Court submitted it. The District Court was without power or authority to override the consistent findings of the special verdict. Gallick v. Baltimore & Ohio R. Co., 372 U.S. 198, 110, 83 S.Ct. 659, 661, 9 L.Ed.2d 618 (1963).

C. Once a Party Waives the Right to a Jury Trial On an Issue, the Court does not have Authority to Sua Sponte Grant a New Trial on the Issues Waived.

FRCP 51 requires a party to object to the failure to give adequate jury instructions. Pau v. Yosemite, 928 F.2d 880, 890-91 (9th Cir. 1991). G.E. and Kaiser failed to request or object to the lack of special interrogatories as to each factual theory of Merlin Carlson's damages. It was G.E. and Kaiser's duty to request such questions. McCord v. Maguire, 873 F.2d at 1271, 1274 (9th Cir. 1989), amended opinion 885 F.2d 650. The form of the special verdict is to be decided before closing arguments so the Court may structure its instructions accordingly. Landes Const. Co., Inc. v. Royal Bank of Canada, 833 F.2d 1365, 1374 (9th Cir. 1987). In the post-trial motion, it was too late for G.E. and Kaiser, hence, the District Court was too late to submit sub-issues on damages to a jury.

Fed. R. of Civ. P. 49(a) provides the District Court with wide discretion in the content and submission of special verdict forms. See Landes Const. Co., 833 F.2d at 1374. The Court's discretion ends with the arrival of consistently answered special verdicts. Gallick, supra.

Before the special verdict form was submitted to the jury, the District Court had the authority to add special interrogatories or redraft the special interrogatories propounded. Here, before

trial Carlson had identified his theories of causation and submitted multiple offers of proof of his theories of causation and damages; during testimony Carlson presented multiple evidence of his injury and damages; and, before instructions Carlson provided a written list of all his contentions of damages. Carlson's theory of damages was not a mystery. The District Court and Appellees-Defendants were completely advised as to Carlson's damages. If the Appellees-Defendants or the District Court believed additional special interrogatories were need then, it was their duty to propose and demand them.

Carlson had no duty to submit special interrogatories on sub-issues of damages. Accord McCord, supra, amended opinion at 873 F.2d at 650. FRCP 49(a) clearly notifies parties and the Court that each party waives the right to a trial by jury on issues omitted unless before the jury retires the party demands its submission to the jury. The right being waived the District Court may not resurrect it. McCord, supra; Burgess, *infra*.

D. The Court had no Authority to Grant a New Jury Trial on Issues Waived by Appellees.

Neither G.E. nor Kaiser moved for a new trial based upon an omission from the special verdict form of sub-issues on damages. The District Court only has jurisdiction to grant a new trial for reasons which it might have granted a new trial on a motion for G.E. and Kaiser. Consenting to a special verdict, G.E. and Kaiser waived their right to move for a new trial based upon sufficiency of evidence to support all the theories of Merlin Carlson, Jr.'s damages. McCord v. Maguire; A. & G. Stevedores v. Ellerman Lines, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962).

G.E. and Kaiser waived their right to do so. Pau, supra at 928 F.2d at 891; and, FRCP 49(a). Once the right has been waived the District Court does not have the authority to give back the right waived. Burgess v. Premier Corp, 727 F.2d 826, 831 (1984).

The District court determined that there was sufficient evidence to support a jury verdict on the neurological theory of Carlson's claim for damages arising out of negligence. In those circumstances where a party has waived the right for a special verdict finding as to factual theories, the Court has consistently held a challenge for sufficiency of the evidence will not lie.

McCord v. Maguire, Piclet v. Piclet, 686 F.2d 1210, 1217 (7th Cir. 1982), cert. denied 103 S.Ct. 73 (1983).

A Court simply cannot choose to ignore a finding that is part of a special verdict. Gallick v. Baltimore & O.R.R. Co., 372 U.S. 108, 110, 83 S.Ct. 659, 9 L.Ed. 618 (1963). G.E.'s and Kaiser's failure to request special verdicts as to each factual theory of Carlson's damages prevent them from challenging the sufficiency of the evidence as to some but not all of the specific damages. McCord at 1274, Landes Const. Co., 833 F.2d at 374. Carlson provided his negligence claim with sufficient evidence of a neurological damage. The jury verdict had to be sustained. G.E. and Kaiser lacked the legal right, hence, the District Court lacked the authority to find fault with a consistent verdict.

E. Appellant Merlin Carlson Was Under No Obligation To Submit Additional Special Interrogatories.

Throughout this litigation G.E. and Kaiser have perpetrated confusion by suggesting an negligent injury to the brain is a separate claim from an injury to the lungs. Merlin Carlson has a negligence claim. The special verdict form covered all the elements of negligence. What part of Carlson's body manifesting the injury did not create separate claims of negligence.

Under Washington law the essential elements of actionable claims for negligence are: (1) the existence of a duty owed to the complaining party; (2) a breach thereof; (3) a resulting injury; and (4) a proximate cause between the claimed breach and the resulting injury. Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). There is no Washington law even suggesting individual manifestations of an injury in a single person creates separate negligence claims. What parts of Merlin Carlson's body and mind were injured are sub-issues of damage that were subsumed in special interrogatories, question no. 2 and question no. 3. CR 476, ER 110. Accord, McCord, 873 F.2d at 1274, Burgess v. Premier Corp., 727 F.2d 826, 831 (9th Cir. 1984).

FRCP 49(a) provides the means for parties and courts to direct the jury through all the elements constituting a claim for relief. The use of a special verdict under FRCP 49(a) comes with a clear warning as to the finality of the jury's findings. FRCP 49(a). The court must assume the jury consciously and correctly responded to each question and instruction. Gallick, supra. In

this case this means the District Court had to assume the jury consciously and correctly applied the law given to them on proximate cause. The District Court did not have the authority to assume the damage amount included assertions with insufficient proof.

F. FRCP 49(a) is viewed in The Context Of the Seventh Amendment.

In Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 110, 83 S.Ct. 659, 661, 9 L.Ed. 618 (1963), the application of a special verdict in the face of a party's multiple contentions was addressed. The Gallick Court of Appeals found on proximate cause that a party had not met its burden to sustain a special verdict. In reversing the Court of Appeals, the United States Supreme Court observed in Gallick, 372 U.S. at 107-108:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weights the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. (Cites omitted).

It is from this very basic premise embodied in the application of the 7th Amendment that the Gallick Court reviewed the court's jurisdiction after a special verdict form has been submitted.

The District Court findings as to Merlin Carlson, Jr. were reweighing of the evidence. Further, the District Court did not consider the clear law of Washington on what types of evidence are sufficient to support a jury verdict. Jurisdictionally, the

District Court was bound to Washington substantive law when considering the jury's findings under FRCP 49(a).

In arriving at its opinions, the District Court only utilized the law of O'Donoghue v. Riggs, 73 Wn.2d 814, 440 P.2d 823 (1968), addressed the standard of proof required in a medical negligence case. This was not a medical negligence case. McLaughlin v. Cook, 112 Wn.2d 829, 774 P.2d 1171 (1989), addressed the general Washington law identifying the nature of medical testimony needed. Under McLaughlin it is not required that a medical doctor state, unequivocally, that a particular condition in a patient is proximately related to the conduct of the defendant. Rather all the medical testimony at trial is considered. McLaughlin at 837. As long as there is medical testimony and the jury need not resort to speculation or conjecture about causation, the proof is sufficient.

Under Washington law medical causation includes consideration of more than specific opinions about particular conditions. The highest court in Washington recognized proximate cause of damage may come from lay witnesses. McLaughlin held at 112 Wn.2d at 837:

> It is not always necessary to proof every element of causation by medical testimony. If from the facts and circumstances in the medical testimony given, a reasonable person could infer the causal connection exists, the evidence is sufficient. Bennett v. Dept. of Labor & Industry, 95 Wn.2d 531, 533, 627 P.2d 104 (1981).

In Bennett, a previous Supreme Court opinion of Bitzan v. Parisi, 88 Wn.2d 116, 558 P.2d 775 (1977), was endorsed. Upon Bitzan, lay witnesses may testify to aspects of physical disability of an injured person that are observable by their senses and describable without medical training, and further the injured person can testify regarding the subjective aspects of injury and to the limitations to his physical movement. Bennett at 95 Wn.2d at 533 paraphrasing Bitzan.

Carlson submits the application of the broad law of McLaughlin, Bennett, and Bitzan would support a jury finding on all his theories of injury. It was in the context of this law that the District Court had a duty to review the sufficiency of Carlson's

evidence on injury and damage. Even under the more stringent O'Donoghue v. Riggs' law, the District Court found Carlson had sufficient evidence to support the jury's verdict of his neurological damages. CR 571, ER 119-120.

G. Difference to the Party's Agreement to FRCP 49(a) Special Verdict and the 7th Amendment Right Precluded a New Trial on Sub-Issues.

The language of FRCP 49(a) is unambiguous. The rule clearly defines what occurs, procedural, when a special verdict form is submitted to the jury. The pertinent language to the jurisdictional issue here is:

> 49(a). . .The court shall give to the jury such explanation and instructions concerning the matters thus submitted as may be necessary to enable the jury to make its finding upon each issue. If in doing so, the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issues so admitted unless, before the jury retires, he demands its submission to the jury. . .

See FRCP 49(a).

Here the District Court's FRCP 56(d) motion and order granting a new trial as to Merlin Carlson came about with a disregard of material jury findings on a special verdict form. The jury's findings on the special verdict form were consistent. The District Court did determine that there was sufficient evidence to support the jury's findings as to the neurological manifestations of Mr. Carlson's injuries. Our Supreme Court has addressed the limit of the court's authority when a special verdict under FRCP 49(a) has been answered by the jury. In Gallick v. Baltimore & Ohio R. Co., 372 U.S. at 119:

> But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364. We therefore must attempt to reconcile the jury's findings, by exegesis

> if necessary. . . . before we are free to disregard the jury's specical verdict and remand the case for a new trial. (Cites omitted).

The special verdict was consistent with a 24 year old male suffering the negligent infliction of a significant brain injury. The District Court lacked jurisdiction to find that the jury determined Merlin Carlson's injury from one or many different organs in his body.

V. CONCLUSION

G.E. and Kaiser did not submit, request, or object to the special verdict form. Before the jury was dismissed, the District Court had wide discretion as to the special verdict form. Once the jury was dismissed, the District Court had no discretion. The answers to the special verdict form were consistent. The answers covered all the elements of a claim of negligence. Under the clear, unambiguous law the District Court was bound to resolve the dispute consistent with the jury's answering of the special verdict form. The District Court had no jurisdiction to theorize as to what theory of Carlson as to damages the jury made its findings. For all the court knows, the jury may have only found for Mr. Carlson on his neurological injuries.

Merlin Carlson was 24 years old when he received a severe injury to his brain. He is unable to live independently. He is unable to be gainfully employed. He has lost the ability and capacity for fulfill his religious obligations as a medicine man for the Blackfeet Tribe. At verdict Mr. Carlson had five years of past injury and 45 years of future life. The consistent jury verdict of $2,775,768.00 for 50 years of severe brain damage and the loss of the ability to function as a normal human being is not unreasonable.

DATED this 16th day of January, 1995.

DAWSON & MEADE

s/_____
Marcia M. Meade,
Attorney for Appellant Carlson

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On January 17, 1995, I served the within

APPELLANT CARLSON'S MEMORANDUM IN SUPPORT OF REMAND, REINSTATEMENT OF VERDICT, AND STAY OF PROCEEDINGS UNDER CIR. R. 27-11.

on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

James B. King
KEEFE, KING
& BOWMAN
W. 601 Main, 1102
Spokane, WA 99201

Joe G. Hollingsworth
SPRIGGS & HOLLINGSWORTH
1350 "I" St., N.W., 9th Fl.
Washington, D.C. 20005

Craig F. Schauermann
SCHAUERMANN & THAYER
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661

Thomas C. Phelan
Attorney at Law
806 Officers Row
Vancouver, WA 98661

Executed this 16th day of January, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

RECEIVED
OFFICE OF THE CLERK
U.S. COURT OF APPEALS
1995 MAR -7 AM 10:03
FILED
DOCKETED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof, Plaintiffs-Appellants.	)	NOS. 94-35145
	)	DC CV-92-0081-FVS
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation, Defendants-Appellees.	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANTS' SCHUDEL, GLASS, SCHUDEL, SCHUDEL, HOWELL (FROESE), THOMPSON, HOPKINS AND HOPKINS MOTION FOR REMAND AND FOR STAY OF SCHEDULE PURSUANT TO CIRCUIT RULE 27.11

Marcia M. Meade
Dawson & Meade
W. 1300 Dean Ave.
Spokane, WA 99201-2015
Telephone: (509) 328-4266
Attorney for Plaintiff-
Appellant Carlson

Craig F. Schauermann
Schauermann & Thayer
1700 NE Fourth Plain Blvd.
Vancouver, WA 98661
Telephone: (360) 695-4244
Attorney for Plaintiff-
Appellants Schudels, Glass
Howell (Froese), Thompson

Thomas C. Phelan
806 Officers Row
Vancouver, WA 98661
Telephone: (360) 750-8750
Attorney for Plaintiff-
Appellants Hopkins

I. RELIEF SOUGHT

Appellants, David Schudel, Daniel Glass, Timothy Schudel, Sandra Schudel, Katherine Howell (Froese), Craig Thompson, Ruth Hopkins, John Hopkins and Merlin Carlson, Jr., move to remand this matter based on:

(1) lack of District Court jurisdiction;

(2) waiver of General Electric Company and Kaiser Aluminum and Chemical Corporation to jury trial of sub-issues omitted from the Special Verdict Form; and,

(3)General Electric Company's and Kaiser Aluminum and Chemical Corporation's have failed to appeal (in regard to these Appellants) the District Court's rulings.

All Appellants request this matter be remanded to Federal District Court, Eastern District of Washington with instructions that the District Court reinstate the original judgment of July 13, 1994.

Appellants further move to stay the schedule pursuant to Fed. R. App. P. Cir. R. 27-11.

II. GROUNDS

There are three grounds for supporting the motion to remand. The grounds apply in different combinations to the

individual appellants.

1. Lack of Timely Service

Judgment in favor of all Plaintiffs-Appellants was originally entered on July 13, 1994. Defendants-Appellees General Electric Company and Kaiser Aluminum and Chemical Corporation, filed their Fed. R. Civ. P. 50 and 59 motions on July 27, 1994, (the 10th judicial day after judgment). Defendant-Appellees timely effectuated service of the Rule 50 and 59 motions on Appellant Carlson, only. (Appellant Carlson's counsel did not represent any of the other Plaintiff-Appellants). Defendants-Appellees failed to timely serve all of the other Plaintiffs-Appellants.

Defendants-Appellees in effecting service upon Plaintiffs-Appellants, Schudel, Glass, Schudel, Schudel, Thompson, Howell (Froese), Hopkins and Hopkins, counsels gave those pleadings to a private delivery service, "Federal Express," on July 27, 1994 (the 10th day) for delivery at a later date. Delivery did not occur until after the 10th day. There is no record of the actual date of service other than the assertion by Defendants-Appellees' counsel that the documents were given to a private delivery service on the 10th day with instructions that the motion be delivered the next day. In order to be timely, Fed. R. Civ. P. 50 and 59 motions must be served within 10 days of the entry of judgment. Service is not complete until actual delivery to the opposing party has occurred or the document has been properly deposited in the "mail." Fed. R. Civ. P. 5(b). The trial court has no jurisdiction to entertain an untimely served post-trial motion. Budinich v. Becton Dickenson and Company, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1462 (9th Cir. 1992). Despite this lack of jurisdiction, the trial court entertained the motions, granted Defendants-Appellees' motion for judgment dismissing the complaint of David Schudel, Daniel Glass, Timothy Schudel, Sandra Schudel, and Craig A. Thompson and ordered a new trial for damages for Kathrene Rae Howell (Froese), John Hopkins and Ruth Hopkins.

2. Waiver of Rights to Issues Under Fed. R. Civ. P. 49(a).

The trial court also granted a new trial as to Merlin Carlson's damages. Merlin Carlson's motion for remand is not

based upon Fed. R. Civ. P. 5(b), but upon lack of jurisdiction under Fed. R. Civ. P. 59(d). Kathrene Howell Froese, Ruth Hopkins and John Hopkins join Merlin Carlson in this additional ground for lack of jurisdiction by the District Court.

The District Court lacked jurisdiction to initiate and grant a motion under Fed. R. Civ. P. 54(d) as to Carlson, Froese, Hopkins and Hopkins. Special interrogatories pursuant to Fed. R. Civ. P. 49(a) (Special Verdict Form) were submitted without objection by the court to the jury. The jury was dismissed after it had consistently answered all the questions in the special verdict form. A judgment was entered on July 13, 1994 based upon the findings of the special verdict form. Defendants-Appellees had a duty to object or submit special interrogatories under Fed. R. Civ. P. 49(a), rather Defendants-Appellees accepted the Special Verdict form as submitted and decided by the jury. Appellees General Electric and Kaiser waived their right to a jury trial on a sub-issues, including damages, because of their lack of objection to the Special Verdict Form used. Despite this waiver by Defendant-Appellees the District Court, sua sponte, four months after the original judgment was entered, granted a new trial Defendant-Appellees pursuant to Fed. R. Civ. P. 59(d). The District Court lacked jurisdiction to grant a new trial on the basis. Accord, Pau v. Yosemite Park & Curry Co., 928 F.2d 880 (9th Cir. 1991); McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989).

Under Fed. R. Civ. P. 59(d) the Court, on its own initiative, may grant a new trial for any reason that a party may have moved for a new trial. General Electric and Kaiser Aluminum waived their right to pursue a Fed. R. Civ. P. 59(b) and (e) motions by their failure to object the Special Verdict Form. They therefore lacked the legal power to move for a new trial on this ground; hence, the District Court lacked jurisdiction to move and grant a new trial under Fed. R. Civ. P. 59(d). Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); Peterman v. Chicago Rock Island and Pacific R. R. Co., 493 F.2d 88, 91 (8th Cir. 1974) cert. denied 94 S.Ct. 3072.

3. Defendant-Appellees have not appealed.

The foregoing grounds for remanding this appeal have previously been made and addressed in motions to remand in the Ninth Circuit U.S. Court of Appeals, Docket No. 94-36250 for all

of the Appellants. In the interim, the status between the parties creates an additional ground for remanding this matter.

This is an action involving multiple parties, not multiple claims by an individual party. The claim made by all Plaintiffs-Appellants was negligence.

All of the Appellants-Plaintiffs have asserted an appeal from the District Court's lack of jurisdiction to enter the November 25, 1994 and January 17, 1995 orders. In making the time of "final" judgment crystal clear to all parties, Plaintiffs-Appellants timely moved for Fed. R. Civ. P. 54(b) certification.

On January 17, 1995 findings were made and 54(b) certification was granted. All of the Plaintiffs-Appellants herein timely filed an Amended and Notice of appeal of the District Court's November 25, 1994 and January 17, 1995 orders. On the other hand, Defendants-Appellees have failed to appeal or cross appeal from even the final Order of January 17, 1995. On January 17, 1995, it was clear a final order was being entered as to all Plaintiffs-Appellants' individual negligence claims.

Defendants-Appellees have failed to appeal any claimed error. The status of this record is that the Defendants-Appellees have not and, now, can not ask this Court to consider any other matter. There being no appeal by Defendants-Appellees this matter is ripe for remand for lack of the District Court' jurisdiction.

III. BASIS

This motion is based upon the files and records herein, the attachments of the motions and memorandum by Appellants in the Ninth Circuit U.S. Court of Appeals Docket No. 94-36250, contemporaneously herein, and the Memorandum of counsels.

DATED this 6th day of March, 1995.

DAWSON & MEADE

s/_____
Marcia M. Meade
Attorney for Appellant Carlson

SCHAUERMANN & THAYER

s/Marcia M. Meade for
Craig F. Schauermann
Attorney for Appellants Schudel, Glass, Schudel, Schudel, Howell (Froese), and Thompson

s/ Marcia M. Meade for
Thomas C. Phelan
Attorney for Appellants Hopkin and Hopkins

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On March 6th, 1995, I served the within

APPELLANTS' SCHUDEL, GLASS, SCHUDEL, SCHUDEL, HOWELL (FROESE), THOMPSON, HOPKINS AND HOPKINS MOTION FOR REMAND AND FOR STAY OF SCHEDULE PURSUANT TO CIRCUIT RULE 27.11

on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

James B. King
KEEFE, KING
& BOWMAN
W. 601 Main, 1102
Spokane, WA 99201

Joe G. Hollingsworth
SPRIGGS & HOLLINGSWORTH
1350 "I" St., N.W., 9th Fl.
Washington, D.C. 20005

Craig F. Schauermann
SCHAUERMANN & THAYER
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661

Thomas C. Phelan
Attorney at Law
806 Officers Row
Vancouver, WA 98661

Executed this 6th day of March, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

RECEIVED
OFFICE OF THE CLERK
U.S. COURT OF APPEALS
1995 FEB 3 AM 10:33
FILED
DOCKETED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON, TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NOS. 94-36250
	)	
	)	NO. CS-92-0081-FVS
	)	
	)	
	)	
	)	
	)	
	)	
	)	
Plaintiffs-Appellants	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,	)	
	)	
	)	
	)	
Defendants-Appellees	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANT CARLSON'S REPLY TO APPELLEE'S MEMORANDUM IN OPPOSITION OF REMAND

Marcia M. Meade
Dawson & Meade
W. 1300 Dean Ave.
Spokane, WA 99201-2015
Telephone: (509) 328-4266
Attorney for Plaintiff-
Appellant Carlson

I. NATURE OF MEMORANDUM

Appellant, Merlin Carlson, Jr., hereby replies to General Electric Company and Kaiser Aluminum Chemical Corporation (hereinafter collectively General Electric) brief in opposition to Carlson's motion for remand.

II. SUMMARY OF ARGUMENT

General Electric asserts the subject of the motion is a matter concerning merits rather than jurisdiction. Mr. Carlson disagrees.

General Electric agreed to a special verdict form. Under FRCP 49(a) General Electric waived the right to submit to another jury issues of injury and damage. The District Court initiated and entered its own order for a new trial. General Electric having waived its right, the District Court was without authority to grant a new trial on sub-issues of damages. General Electric did not appeal the District Court's denial of its motions, so questions of merit by General Electric are moot.

III. LAW

A. There is authority to support a remand based upon jurisdictional error.

General Electric argues:

"Mr. Carlson has not cited any authority, and there is none, in support of his attempted circumvention of the briefing rules."[12]

Mr. Carlson has and does cite authority for his Motion to Remand for Lack of Jurisdiction. FRCP 49(a) and FRCP 59(d) are authority. FRCP 49(a) deprives the District Court the jurisdiction to submit "issues so omitted" from the special verdict form to another jury. *See* FRCP 49(a). Under FRCP 59(d) the District Court's jurisdiction is limited to specific circumstances. The District Court's authority is limited to its motions brought within 10 days of judgment and to reasons which it might have granted a new trial to a party. FRCP 59(d).

The District Court did not move on its own initiative within 10 days of the judgment. Simply, if the parties may not move, the District Court may not move on its own initiative for a new trial. The District Court did not have authority to act, because the parties removed the issue from the District Court's jurisdiction by operation of FRCP 49(a).

B. The Issue is a Matter of Law, Not Underlying Merit

A special verdict form was used. CR 476, ER 1.2. General Electric neither submitted, objected, or requested an additional question on injury or damage to Mr. Carlson. General Electric removed from the District Court's jurisdiction all rights to submit sub-issues of neurological or non-neurological damages. FRCP 49(a). FRCP 49(a) is clear and unambiguous--questions not submitted to the jury are waived by all the parties. FRCP 49(a). General Electric has waived the right to another jury deciding the damages as to neurological and non-neurological damages. The fact of the special verdict is undisputed.

Jurisdictional challenge is not merit dependent. Merlin Carlson, Jr. has identified the District Court did not have jurisdiction to give back what General Electric waived under FRCP 49(a). Jurisdictionally, when General Electric waived its right, the District Court lost jurisdiction to order on its own initiative a new trial to decide sub-damage issues. The fact of the District Court denial of General Electric's motion for a new trial

---

[12]See General Electric's "Response Brief in Opposition to Appellant Carlson's Motion For Remand" at page 4 ¶ 1

and the District Court initiation and entry of its own order for a new trial, can not be disputed. The order speaks for itself. CR 571, ER 12.

If the facts are undisputed it is a question of law. A pure question of law on jurisdiction can present on a motion. U.S. v. Nukida, 8 F.3d 665 (9th Cir. 1993). When underlying merit is not an issue the interests of judicial economy permits resolution on motion. Nukida at 670. If jurisdiction was fact dependent and the facts were in dispute, then a full hearing would be necessary. Nukida at 669. A full appeal is not necessary, because the jurisdictional issues are not fact dependent.

C. The Record Does Not Bear Out General Electric's Contentions or Arguments.

Here, jurisdiction is not fact dependent. Jurisdiction can and should be decided, now. General Electric suggest there are questions of merit, when it states in its Responsive Memorandum:

> "The District Court agreed, struck much of Mr. Carlson's evidence and granted General Electric a new trial with respect to Mr. Carlson's claim. CR 571."[13]

This statement is not true. CR 571, ER 6-7,11-12. Mr. Carlson's evidence was not "struck". CR 571, ER 6-7, 11-12. The District Court did not grant General Electric's motion for a new trial, but rather the District Court initiated and entered its own order for a new trial. CR 571, ER 9,10,12. General Electric went on to state:

> "Because [the new trial] the order was squarely grounded on General Electric's motion, the lower court had jurisdiction to enter it.[14]

The District Court's ruling is contrary to General Electric's assertion. It was made very clear the new trial was not grounded in General Electric's motion, when the District Court ruled:

> "...The defendants are granted judgment as a matter of law on all non-neurological claims asserted by Merlin

---

[13]See footnote 1 Supra, at page 4 ¶ 2.
[14]See footnote 1 Supra, at page 4 ¶ 2.

Carlson. Those claims are dismissed with prejudice. ... The defendants are granted a new trial on all remaining claims.

6. **THE DEFENDANTS' MOTION FOR A NEW TRIAL OR ALTERNATIVE RELIEF (Ct. Rec. 486) IS DENIED.**

(Emphasis Added)" See CR 571, ER 12.

The ruling is clear. The new trial was granted on the District Court's FRCP 59(d) motion and not General Electric's motion. The order granting a new trial absolutely was not squarely grounded on General Electric's motion.

General Electric cites Southern Pac. Co. vs. U.S. District Court, 190 F.2d 735 (1951) as supportive of its position. In Southern Pac. Co. it was specifically found the Court did not grant a new trial under FRCP 59(d). The authority General Electric cites is not applicable to the indisputable order, hence record, herein. Pau v. Yosemite Park and Curry Co., 928 F.2d 880 (9th Cir. 1991) and Stradley v. Cortez, 518 F.2d 488 (1975) are authorities which do apply to the record herein. Pau and Stradley answer affirmatively for Mr. Carlson's position the jurisdictional question.

D. On this record General Electric's Challenge Directed to It Questions of Merit Are Moot.

General Electric urged Mr. Carlson's appeal was premature. Since filing the motion for remand the District Court has certified this matter as appealable. CR unknown, ER 15,16. Further, the District Court recognized challenges to the jurisdiction on granting a motion for new trial are immediately appealable. See Eaton v. National Steel Products Co., 624 F.2d 863, 864 (9th Cir. 1980). CR unknown, ER 16.

Under FRCP 59(d) the District Court's authority was limited to "reasons for which it might have granted a new trial on motion of a party." FRCP 59(d). FRCP 49(a) constrained General Electric from moving for a new trial on non-neurological and neurological damages. The District Court was likewise constrained. FRCP 59(d) General Electric has not appealed the denial of its motion for a new trial on other matters. There are no questions of fact as to the application of FRCP 59(d) in this case. There is no question of fact as to the status of the appeal. The

issue is purely a question of law.
General Electric infers the following as to the Motion to Remand:

> "[T]he argument that the Court erred in granting General Electric the relief which it requested does not rise to a 'jurisdictional' argument so as to preclude resolution with full briefing on the merits."[15]

Mr. Carlson appealed the District Court's new trial ruling. CR 584, ER 14. General Electric did not appeal the District Court's denial of its new trial ruling. General Electric did not appeal the District Court's denial of its motion to dismiss Mr. Carlson's neurological damages. Now and forever the merits of the neurological vs. non-neurological damages to Mr. Carlson as to General Electric are not pertinent. The question is purely of whether the District Court had jurisdiction to grant a new trial on sub-issues of damages.

The issue, now, is purely jurisdictional. Either the District Court had authority to grant a new trial on what was waived by General Electric or the District Court did not have the authority. The application of FRCP 49(a) and FRCP 59(d) created a purely jurisdictional question. Here, the application of FRCP 59(d) and FRCP 49(a) have not created questions of merit.

IV. CONCLUSION

The application of FRCP 49(a) and FRCP 59(d) do not involve discretion. The questions posed on Mr. Carlson's Motion are purely questions of law. If the District Court did not have jurisdiction then the November 25, 1994, order was void as to Merlin Carlson, Jr. Neither General Electric Company nor Kaiser Aluminum and Chemical Corporation have appealed the November 25, 1994, order. Very Simply, Merlin Carlson, Jr. wants his judgment on the verdict reinstated. A special verdict form was submitted and used, so appeals such as this could be avoided. In the interest of judicial economy and due process Mr. Carlson urges it is expeditious to dispose of this matter on a motion to remand with directions to reinstate the judgment upon

---

[15]See footnote 1 Supra page 4 ¶1.

the verdict in Mr. Carlson's favor.
DATED this 2ND day of February, 1995.

DAWSON & MEADE

/s/_____
Marcia M. Meade, WSBA 11122
Attorney for Appellant Carlson

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On February 2nd, 1995, I served the within

APPELLANT CARLSON'S REPLY MEMORANDUM TO APPELLEES' MEMORANDUM IN OPPOSITION TO REMAND

on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

James B. King
KEEFE, KING
& BOWMAN
W. 601 Main, 1102
Spokane, WA 99201

Joe G. Hollingsworth
SPRIGGS & HOLLINGSWORTH
1350 "I" St., N.W., 9th Floor
Washington, D.C. 20005

Craig F. Schauermann
SCHAUERMANN & THAYER
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661

Thomas C. Phelan
Attorney at Law
806 Officers Row
Vancouver, WA 98661

Executed this 2nd day of February, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

RECEIVED
OFFICE OF THE CLERK
U.S. COURT OF APPEALS
1995 FEB 15 AM 11:30
FILED
DOCKETED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCHUDEL; DANIEL GLASS; MERLIN E. CARLSON; TIMOTHY SCHUDEL and SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE HOWELL; CRAIG A. THOMPSON; DEBORAH GUARAGNA; and JOHN and RUTH HOPKINS, husband and wife, and the marital community composed thereof,	)	NOS. 94-36250/ 95-35010
	)	DC CV-92-0081-FVS
Plaintiffs-Appellants,	)	
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	
Defendants-Appellees.	)	

United States District Court for the Eastern District
of Washington Civil No. CV-92-00081-FVS
The Honorable Fred Van Sickle, District Judge

APPELLANTS-PLAINTIFFS' AND APPELLEE GUARAGNA'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Marcia M. Meade
Dawson & Meade
W. 1300 Dean Ave.
Spokane, WA 99201-2015
Telephone: (509) 328-4266
Attorney for Plaintiff-
Appellant Carlson

Craig F. Schauermann
Schauermann & Thayer
1700 NE Fourth Plain Blvd.
Vancouver, WA 98661
Telephone: (360) 695-4244
Attorney for Plaintiff-
Appellants Schudels, Glass
Howell (Froese), Thompson

Thomas C. Phelan
806 Officers Row
Vancouver, WA 98661
Telephone: (360) 750-8750
Attorney for Plaintiff-
Appellants Hopkins

I. NATURE OF MEMORANDUM

Appellees, General Electric Company and Kaiser Aluminum and Chemical Corporation (hereinafter collectively referred to as General Electric) made a generic motion to dismiss all of Appellants-Plaintiffs' Appeals for want of jurisdiction. Appellants will show this Court does, now, have jurisdiction. Appellants, Glass, Thompson, Schudel, Schudel, Schudel, Howell Froese, Hopkins and Hopkins have a common jurisdictional basis for appeal. (hereinafter Schudel, Schudel, Schudel collectively referred to as Schudels.) (hereinafter Hopkins and Hopkins collectively referred to as Hopkins). Appellants Froese and Hopkins have an additonal jurisdictional basis that is also common to Appellant Carlson.

II. SUMMARY OF THE ARGUMENT

General Electric has not meet its burden to show this Court lacks jurisdiction.

General Electric failed to timely serve Fed. R. Civ. P. 50 and 59 motions, so the District Court lacked jurisdiction to consider these post-trial motions as to Schudels, Glass, Thompson, Froese, Hopkins and Guragana. The District Court lacking jurisdiction, this Court, now, does have jurisdiction under the controlling authorities.

Under Fed. R. Civ. P. 49(a) and 59(d), Appellant Carlson, along with Froese and Hopkins, have another jurisdictional basis of appellate jurisdiction. General Electric waived the right to challenge the special verdict on omitted sub-issues. Since General Electric lacked the right to move for a new trial on omitted issue, the District Court could not acquire that basis under Fed. R. Civ. P. 59(d). Without the authority to act the District Court lacked the jurisdiction to order a new trial on omitted sub-issues for Carlson, Froese and Hopkins.

The Appellants' appeals should not be dismissed. Rather Appellants' motions to this Court, to remand and instruct that the November 25, 1995, order and January 17, 1995 orders be stricken, should be granted. The only enforceable judgment, now, remaining for all the Plaintiffs is that of July 13, 1994.

III. LAW

A. Standard of Review for Procedural Issues.

General Electric failed to identify the standard of review. Whether it is in District Court or in Appellant Court, jurisdiction is a question of law. U.S. v. Nukida, 8 F.3d 665, 669 (9th Cir. 1993). Jurisdictional issues, including issues of procedure such as determination of whether a party waived a right to a jury trial on a sub-issue and the Court's motions under Fed. R. Civ. P. 56(d), are reviewed do novo. Westinghouse Electric Corp. v. Newman and Holzinger, P.C., 9 92 F.2d 932 (9th Cir. 1993); Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260, 1262 (9th Cir. 1993); Dubbs v. C.I.A., 966 F.2d 1114, 1118 (9th Cir. 1989); see also 2 Federal Procedure, L.Ed., Appeal, Sarschory, and Review, § 3:652 (1981).

B. Summary of Appeals filed by Appellants-Plaintiffs.

On July 13, 1994, a judgment on special verdicts was entered in favor of each plaintiff. CR 477, ER 22-25. An order and judgment of dismissals and new trials were entered on November 25, 1994. CR 571, 572, ER 27-31. Appellants-Plaintiffs filed a Notice of Appeal on December 21, 1994. CR 584, ER 34. Then Fed. R. Civ. P. 54 motions were pending. CR 577 ER 32-33. On January 17, 1995, the District Court entered an order on those motions. CR 600, ER 43. These Appellants-Plaintiffs filed an Amended Notice of Appeal on January 27, 1995. CR 669, ER 45. Appellants-Plaintiffs filed another Notice of Appeal on February 7, 1994. CR 676, ER 47-53.

C. Short Answer

In District Court and on appeals Appellants-Plaintiffs have asserted the District Court lacked jurisdiction to consider untimely served Fed. R. Civ. P. 50(b) and 59 motions on the judgment for Schudels, Glass, Thompson, Froese, and Hopkins. CR 676, ER 47-53 Appellant Carlson, as well as Hopkins and Froese, have asserted the District Court lacked jurisdiction under Fed. R. Civ. P. 59(d) to order a new trial to determine issues omitted from the Special Verdict form. See also Fed. R. Civ. P. 49(a). In its motion General Electric ignores these challenges to the District Court's jurisdiction.

Without reservation venerated law holds an order granting a new trial is reviewable as a final judgment when the district court's jurisdiction is challenged. Phillips v. Negley, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013 (1886); also see, Jones & Guerrero Co., Inc. v. Sealift Pac., 650 F.2d 1072, 1073 (9th Cir. 1981).

The District Court ruled that the order final based on the jurisdictional challenges. CR 600, ER 42, 43. Accord Eaton v. National Steel Production Co., 624 F.2d 863, 864 (9th Cir. 1980). Unlike General Electric, the District Court noted the general premise, that a order granting a new trial is interlocutory, has an exception when a new trial under Fed. R. Civ. P. 56(d) is challenged on jurisdictional grounds. Eaton at 864.

D. A Motion To Dismiss Is Improper Under the Record and Law.

In District Court General Electric had notice of jurisdictional challenges. In moving General Electric relies on Eaton v. Nat'l Steel Products Co. The Eaton Court clearly states the law at 624 F.2d at 864:

> Though an exception to this rule [new trial orders are interlocutory] has been recognized when the district court grants a new trail when it has not jurisdiction to do so. . . . (cites omitted).

In this case the District Court ruled jurisdictional challenges result in final decisions for purposes of appeal. Additionally, the District Court certified the order as to all Appellant-Plaintiffs under Fed. R. Civ. P. 54(b). Given the record why has General Electric moved to dismiss to dismiss the appeals, its included.

The judgment for Schudels, Glass, Thompson, Froese, Hopkins, and Guaragna was entered on July 13, 1994. When the post-trial motions were not timely served by General Electric as to those plaintiffs, the District Court lost jurisdiction to consider those post-trial motions. Additionally, the time for filing appeals was not tolled. The time for General Electric to file an appeal ran on August 12, 1994. Fed. R. App. P. 4(a). Thereafter, General Electric failed to file appeals as to Schudels, Glass, Thompson, Froese, Hopkins and failed to timely file as to Appellee Guaragana.

Only Appellant Carlson was timely served with the post-trial motions. On November 25, 1994, the District Court granted a new trial under Rule 59(d) on grounds not available to General Electric or the District Court. On November 25, 1994, the District Court specifically denied General Electric's motion for a new trial as to Appellant Carlson. Once the District Court ruled on the timely Carlson's motions, the appeals clock began ticking. Again, General Electric had notice of a jurisdictional challenge and the finality of the November 25, 1994, order. General Electric's time to file an appeal as to Carlson ran on December 27,

1994.[1] General Electric failed to file any appeal as to Carlson.

By January 17, 1995 all Appellants-Plaintiffs moved this Court to remand and instructed the District Court to strike the November 25, 1994, amended judgment; and, Appellee-Guaragna moved to strike the only appeal General Electric has filed for lack of jurisdiction. Thereafter General Electric only files an appeal as to Guaranga's judgment. In response to the order and these motions General Electric without acknowledging the jurisdictional challenges to the District Court's authority, moves to dismiss the Appellants-Plaintiffs appeals for lack of jurisdiction.

Perhaps General Electric's Motion to Dismiss is a veiled attempt bootstrap issues that General Electric is now time barred from bringing. On January 31, 1995, General Electric knew its failure to take mandatory appeals as to all 10 Plaintiffs. As General Electric noted "timely notice of appeal is mandatory and jurisdictional."[2] Having lost the opportunity to file an appeal as to any of the Plaintiffs, General Electric is using smoke and mirrors, rather than the record and the law, to gain a foot hold in District Court.

E. Appellee-Guargana has not appealed.

Appellee Guaragna did not appeal. Appellee Guaragna does not know why General Electric would move to dismiss its own appeal.

General Electric failed to toll the time for filing an appeal from the July 13, 1994, judgment by not timely filing Fed. R. Civ. P. 50(b) and Fed. R. Civ. P. 59 motions. General Electric was required to file a notice of appeal by August 12, 1994. General Electric has failed to meet that jurisdictional requirement. Appellee Guaragna has currently pending a motion to dismiss General Electric's appeal for lack of jurisdiction.

---

[1] The time ran on December 25, 1994, but General Electric gained two days because of a holiday.

[2] General Electric's Memorandum in Support of Motion to Dismiss Appeal at page 6 citing as authority Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978).

F. The January 17 Order Certified Under Rule 54 All Plaintiffs' Right to Appeal

General Electric states: "On the question of 'judgment' as to the latter four [Hopkins, Hopkins, Froese and Carlson], the Court explicitly held . . ."[3] This is inaccurate and misleading. The District Court did not "hold" what General Electric asserts to this Court. Rather the District Court applied an "[a]nalysis" to Appellants, Hopkins', Hopkins', Froese's and Carlson's "[r]elief [r]equest". CR 600, ER 38,42, 43. Not only has General Electric improperly couched an "analysis" as an "holding", the analysis is offered out of its total context. General Electric's argument fails when the analysis is in context.

General Electric never explains why or how this Court can ignore the District Court's recognition that:

> . . . An order granting a new trial is interlocutory. As a general rule, it is not appealable under 28 U.S.C. § 1291. Roy v. Volkswagenwerk Aktiengesellschaft, 781 F.2D 670, 671 (9th Cir. 1985); Eaton v. National Steel Products Company, 624 F.2d 863 (9th Cir. 1980). There is an exception to that rule, however. An order granting new trial may be appealed if the district court no longer had jurisdiction to do so. See Eaton, 624 F.2d 864. (Emphasis Added)

General Electric fails to explain why or how this Court can ignore:

> **"IT IS HEREBY ORDERED:**
>
> 4. The parties' respective motions for Rule 54(b) certification (Ct. Recs. 574, 577) are granted:
>
> (a) There is no just reason to delay appellate review of the Court's Order Re Post-Trial Motions (Ct. Rec. 571); and
>
> (b) Since the Clerk has already entered judgment

[3] Footnote 4, supra at p. 5.

(Ct. Rec. 572) will become the final judgment for purposes of Rule 54(b) upon entry of this order. . ." CR 600, ER 43, CR 577, ER 32-33.

There is no record nor controlling precedent to support General Electric's argument that Appellants-Plaintiffs' Notice of Appeals were not valid, timely and now permissible.

G. Analysis of Appellants-Plaintiffs' Right to Appeal Is Individually Determined

General Electric suggests all the Plaintiffs actions must be disposed of before any matter is final, citing Briscoe Co. v. Morrison-Knudsen Co., 776 F.2d 1414 (9th Cir. 1985). On this record General Electric's position is illogical. See Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 100 S.Ct. 1460, 64 L.Ed.2d 1(1980). All of the Appellants-Plaintiffs' negligence actions were independent of one another. CR 476, ER 1-21. Each of the Plaintiffs' negligence claim was tried individually and was self-contained. The facts of the Plaintiffs' cases maybe interrelated, but the legal causes of action were not related.

H. Fed. R. App. P. 4(a)(2) applied to the November 25, 1995, Order.

General Electric suggest Appellants-Plaintiffs are not entitled to the employ Fed. R. App. P. 4(a)(2) based on its application of First Tier Mortgage Co. v. Investor's Mort'g Ins. Co., 498 U.S. 269, 112 L.Ed. 743, 111 S.Ct. 648 (1991). Appellants-Plaintiffs specifically challenged whether the District Court had jurisdiction to amend or modify the July 13, 1994, order. According to controlling precedent of Phillips v. Negley and Gallick v. Baltimore & Ohio,[4] the November 25, 1994, Order "would be appealable if immediately followed by entry of judgment." Accord First Tier 498 U.S. at 276. An order without jurisdiction would immediately be appealable following entry of judgment. It has been specifically and consistently recognized that 28 U.S.C. § 1291 jurisdiction is acquired, when the District Court

[4]372 U.S. 198, 110, 83 S.Ct. 659, 661, 9 L.Ed.2d 618 (1963).

without jurisdiction attempts to amend or modify a previous judgment. See Eaton, supra 624 F.2d at 864 citing Stradley v. Cortez, 518 F.2d at 491 (where there was lack of jurisdiction to act under Fed. R. Civ. P. 59(d)).

Fed. R. App. P. 4(a)(2) permits a notice of appeal from a non-final decision to operate as a notice of appeal from the final judgment, when there is decision that would be appealable if immediately followed by entry of judgment. First Tier 498 U.S. at 276. The Supreme Court observed of Rule 4(a) in First Tier 498 U.S. at 273:

> The rule [4(a)] recognizes that, unlike a tardy notice of appeal, certain premature notices do not prejudice the appellee and that the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal.

The Supreme Court stressed the Rule allows a notice of appeal to relate forward, if there is no surprise or unfairness to the appellee. First Tier at 276-77. General Electric never explains how relating the December 21 forward would prejudice, surprise or be unfair to General Electric.

General Electric suggest it was a surprise that Sandra Schudel would appeal the dismissal of her loss of consortium claim, when her husband's primary claim was entirely dismissed. Even if General Electric was surprised the matter is now moot by the filing of the February 7, 1995, appeal.

General Electric suggest Fed. R. App. P. 4(a)2 is unavailable to Appellants-Plaintiffs, because they are not unskilled litigants, who filed a notice of appeal from decision they reasonably but mistakenly believed to be final.[5] There is no authority suggesting Rule 4(a)2 is only available to unskilled litigants. This "protection" of unskilled litigants may be one purpose of the Rule, but it is not the only purpose. See Advisory Committee's Note Fed. R. App. P. 4(a)(2).

General Electric's argument on Rule 4(a)(2) is specious on two further grounds. The Notices of Appeal were filed after written orders and filed judgments, hence factually, In Re Jack

[5]General Electric's Memorandum in Support of Motion to Dismiss at pp.9-10.

Raley Const., 17 F.3d 291 (9th Cir. 1994) is not applicable to this case. The Notice of Appeal were not filed from a Magistrates ruling, hence procedurally, Serine v. Peterson, 989 F.2d 371 (9th Cir. 1993), is not germane here.

I. When a Party Fails To Timely Served Post-Trial Motions The District Court is Without Authority To Act. A Party May Appeal When The District Court Act Without Authority

Except for Carlson, none of the Plaintiffs were timely served with General Electric's Fed. R. Civ. P. 50(b) and Fed. R. Civ. P. 59 motions. Through out Schudel, Glass, Thompson, Froese and Hopkins have maintained the District Court lacked jurisdiction to amend or modify the July 13, 1994 judgment. Jurisdiction for these nine Appellants to file an appeal on December 21 was conferred by the controlling precedent of Phillips v. Negley, 117 U.S. at 673. Also See Demeretz v. Daniels Motor Freight, Inc. 307 F.2d 469, 471 (1962); and, Eaton, supra, 864.

J. Under Fed. R. App. P. 4(a)(2) and (4) When A Claim is Totally Dismissed Against All Defendants This Court Has Jurisdiction

Five of the Appellants, Schudels, Glass, and Thompson, had their respective claims dismissed in entirety by an order of dismissal and by a written amended judgment entered on November 25, 1994. Under Fed. R. App. P. 4(a)1 the Appeal of December 21, 1994, was timely and not premature. Under Fed. R. App. P. 4(a)2 at most the order of January 17, 1995, treated the December 21, 1994, as if it was filed on January 17, 1995. Under Rule 4(a)4 the December 21, 1994, Notice of Appeal was still in effect by the timely filing of an Amended Notice of Appeal on January 27, 1995. Finally, under Fed. R. App. P. 4(a)1 this Court undoubtedly has jurisdiction on another Notice filed on February 7, 1995.

K. When a District Court Lacks Jurisdiction Under Fed.R. Civ. P. 59(d) To Grant A New Trial It Is A Final Appealable Matter

The three Appellant. Hopkins. Hopkins and Froese. share the additional jurisdictional basis with the remaining Appellant. Carlson. Under Fed. R. Civ. P. 49(a) and 56(d) the District Court did not have jurisdiction to order a new trial for Appellants. Hopkins. Froese or Carlson. Stradley. supra 491. McCord v. Maguire. 873 F.2d 1271. 1274 (9th Cir. 1989). amended opinion 885 F.2d 650. On this jurisdictional issue it is controlling that the new trials were granted under Fed. R. Civ. P. 59(d) and not 59(b) or (c).

General Electric moved on numerous grounds for a new trial or an alternative relief under Fed. R. Civ. P 59(b). CR 486. ER 26. On November 25. 1994. the District Court then moved on different grounds under Fed. R. Civ. P. 59(d) to ordering a new trial for omitted sub-issues of damages for Hopkins. Froese. and Carlson. CR 571. ER 28. For appellate jurisdiction the pertinent portions of that order are:

> 5. The defendants are granted a new trial on all remaining claims [Hopkins. Froese and Carlson].
>
> 6. **THE DEFENDANTS' MOTION FOR A NEW TRIAL OR ALTERNATIVE RELIEF (Ct. Rec. 486) IS DENIED.** (Emphasis Added)" See CR 571. ER 28. CR 486. ER 26.

The ruling was clear. The new trial was ordered on the District Court's Rule 59(d) motion. not on General Electric's motions. The Court's order was predicated upon the Court's request for finding on sub-issues omitted from the special verdict form.

Pertinent to appellate jurisdiction is the interaction between Fed. R. Civ. P. 59(d) and 49(a). Both rules are jurisdictional. Stradley v. Cortez; and Gallick v. Baltimore & Ohio R. Co.. 372 U.S. 198. 110. 83 S.Ct. 659. 661. 9 L.Ed.2d 618 (1963). The District Court's authority to order a new trial on omitted sub-issues of damages was terminated when the parties agreed to a Special Verdict under Fed. R. Civ. P. 49(a). Accord

McCleod, supra. Under the limited authority of Fed. R. Civ. P. 59(d) the District Court did not have the authority to grant a new trial on issues disposed of by the special verdict. Burgess v. Premier Corp., 727 F.2d 826, 831 (9th Cir. 1984). A district court's authority to order a new trial sua sponte is limited by two jurisdictional requirements--time and potential scope of a district court initiated motion. Fed. R. Civ. P. 59(d).[6]

The district court may initiate its own motion within 10 days of a entered judgment. Fed. R. Civ. P. 59(d). Here, the District Court's motion was more than four months after the judgment. After missing the first ten days the District Court could only act when timely motions for a new trial have been made by a party. The Court's motion was untimely as to Hopkins and Froese.

Further limitations are that the District Court may enter a new trial only for a reason that a party might move. Fed. R. Civ. P. 59(d). General Electric could not have moved for a new trial for omitted sub-issues on damages, hence, the District Court lacked the authority to enter an order for a new trial on omitted sub-issues. Burgess, 727 F.2d at 831.

The parties agreed to a special verdict under Fed. R. Civ. P. 49(a). CR 467, ER 1-21. General Electric did not submit, object nor demand additional inquiries on injury and damages on the special verdict form.[7] Once, agreeing General Electric was bound to the special verdict findings as to Hopkins, Froese and Carlson. McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989). Rule 49(a) is clear that any issues omitted from the special verdict are waived. Burgess, at 831; also see Pau v. Yosemite Park & Curry Co., 928 F.2d 880 (9th Cir. 1991). Under Fed. R. Civ. P. 49(a) a party waives the right to submit to another jury any issue

---

[6]For an extensive analysis to the relationship between Rule 59(d) and Rule 49(a) as they relate to the District Court's jurisdiction, see Appellant Carlson's Memorandum in Support of Remand for Lack of Jurisdiction and Reply Memorandum to General Electric's Opposition to Carlson's Motion to Remand herein. Those memorandums are adopted, incorporated, and relied upon herein by reference.

[7]Appellees-Defendants did not object, except or comment about the special verdict form actually submitted to the jury for any Appellant-Plaintiff. Appellees-Defendants counsel were present at the jury verdict. Appellees-Defendants never requested before the jury was dismissed that additional questions be submitted to the jury.

omitted from a special verdict form. Pau, 928 F.2d at 891-92.

The clear language and authorities endorsing Fed. R. Civ. P. 49(a) have consistently held this Rule, once accepted, limits the rights of the parties and of the District Court. Gallick, supra. 372 U.S. at 119 citing Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd., 369 U.S. 355, 364 82 S.Ct. 780, 7 L.Ed. 798 (1962). The District Court herein ordered what neither the court nor any of the parties had the right to do. Appellants' Carlson, Froese, and Hopkins challenge to jurisdiction are supported by the undisputed record and the controlling law.

L. Burden of Proof for Granting Summary Reversal and Affirmance of the District Court.

The Appellants-Plaintiffs and Appellee Guaragna have previously moved for a summary decision by this Court on the lack of jurisdiction for the District Court to amend or modify the July 13, 1994, judgments. Appellants-Plaintiffs now how objected and argued against General Electric's motion to dismiss for lack of jurisdiction their appeals. In responding General Electric may suggest Appellants-Plaintiffs positions are inconsistent such a suggestion would not be true. Appellants-Plaintiffs have consistently maintained the District Court did not have jurisdiction to dismiss five of the claims and order new trials on four of the claims. If Appellants-Plaintiffs application of the law to this record is correct, then resolution of the jurisdictional issues is dispositive of the entire matter.

Appellants-Plaintiffs and Appellee Guaragna all moved on jurisdictional basis for the matter to be summarily remanded to the District Court with instructions to enforce the July 13, 1994 judgments. A party who requests affirmance or summarily reversal has a heavy burden. United States v. Glover, 731 F.2d 41, 44 (D.C. Cir. 1984). Appellant-Plaintiffs and Appellee Guaragna must demonstrate that the merits of their claim are so clear as to justify expedited action. Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir. 1980). Appellants-Plaintiffs and Appellee Guaragna have met this burden.

The judgment of the jury on the special verdict came after three months of trial. The judgment was entered on July 13, 1994. The time requirements of Fed. R. Civ. P. 50 and 59 are jurisdictional. Budinich v. Becton Dickinson and Co., 486 U.S.

196, 203, 108 S.Ct. 1717, 100 L.Ed. 178 (1988). The District Court cannot consider untimely Fed. R. Civ. P. 50 and 59 motions. Browder v. Dept. of Corrections, 434 U.S. 257, 264-65, 267, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978).

On the merits of this appeal the District Court did not have the jurisdiction to amend or modify the July 13, 1994, judgment as to Schudels, Glass, Thompson, Froese, Hopkins or Guaragna. General Electric has failed to timely file an appeal as to any of those Plaintiffs by August 12, 1994. Given the record and the clear controlling law this Court's authority is limited to remanding this matter to the District Court with instructions to strike the November 25, 1994, and January 17, 1995, Orders. The only valid judgment existing as to Schudels, Glass, Thompson, Froese, Hopkins and Guaragna is the July 13, 1994, orders.

Under Rule 49(a) a special verdict form was used to resolve the dispute between Carlson and General Electric. General Electric neither submitted, objected, or requested an additional question on injury or damage to Mr. Carlson. General Electric removed from the District Court's jurisdiction all rights to submit omitted sub-issues of neurological or non-neurological damages. Fed. R. Civ. P. 49(a). Accord McCord, 873 F.2d at 1274.

Fed. R. Civ. P. 49(a) is clear and unambiguous--questions not submitted to the jury are waived by all the parties. Fed. R. Civ. P. 49(a). General Electric waived the right to another jury deciding the damages as to neurological and non-neurological conditions. Further, the District Court was prohibited from presuming the jury awarded damages for non-neurological conditions in Carlson. Gallick, supra. When General Electric lacked the right, the District Court could not acquire the right under Fed. R. Civ. P. 59(d).

The District Court made a factual finding to the omitted issue of neurological injury. The District Court found Carlson had a neurological injury as a result of General Electric's negligence. Under Fed. R. Civ. P. 49(a) the District Court had a duty "to reconcile the jury's findings, by exegesis if necessary, . . . before we [the judiciary] are free to disregard the jury's special verdict and remand the case for a new trial." Gallick v. Baltimore & Ohio R. Co. 372 U.S. at 108. The District Court failed to make another finding as to the damages arising from the

neurological injury found by it and presumably the jury. Fed. R. Civ. P. 49(a) controls this failure to find by the District Court.

Rule 49(a) is clear and unambiguous as to the disposition of the damage issue as to Appellant Carlson. When the District Court failed to make a finding as to the amount of damages from the neurological injury, "it shall be deemed to have been made a finding in accord with the judgment on the special verdict." Fed. R. Civ. P. 49(a). According to the Rule and the controlling authorities of Gallick, and McCord the only finding that may ever be made is that Appellant Carlson suffered $2,775,768.00 in damages nothing more and nothing less. Any other decision was waived by General Electric on July 13, 1994, when the jury was dismissed. Most certainly, any question about the decision was waived on December 27, 1994 when General Electric failed to file an appeal from the District Court's findings whether stated or by operation of Fed. R. Civ. P.

On the merits the only resolution possible is that Appellant Carlson has suffered $2,775,768.00 in damages from the negligent conduct of General Electric. All other possible resolutions were subsumed in the voluntary agreement to be bound by a special verdict form. General Electric has waived the right to further decide the matter, hence the neither the District Court or this Court may alter the matter so decided on July 13, 1994.

IV. CONCLUSION

Under this record and the controlling authorities this Court has jurisdiction to decide the jurisdictional errors. Under the venerated authority of Phillips v. Negley this Court and the United States Supreme Court are the only Courts with jurisdiction to resolve this dispute as it now stands.

General Electric motion to dismiss was predicated on an incomplete and perhaps even inaccurate presentation of the record. When the record pertinent to jurisdiction is considered the application of the law cited by General Electric is straight forward. Even under General Electric's authorities of Browder v. Dept. Corrections, this Court has jurisdiction to remand all the appeals with instructions to the District Court to strike the November 25, 1994, and January 17, 1995 orders. Under the law cited by General Electric, the District Court lacked jurisdiction to amend or modify the July 13, 1994 order.

General Electric's motion to dismiss was maintained knowing: 1) it had waived the right to a jury trial under Fed. R. Civ. P. 49(a); 2) the District Court had found an injury had occurred to Carlson, Hopkins, Hopkins and Froese under Rule 49(a); 3) and the District Court's failure to make a contrary finding on damages could only now be found to be in accord with the special verdict findings. General Electric having failed to object, argue or in any way acknowledge its waiver under Rule 49(a) is bound to the special verdict findings and the one finding made post verdict by the District Court. General Electric was and is bound, so the District Court and this Court are bound by the special verdict of the jury.

Dated this 14th day of February 1995.

S/_____
Marcia M. Meade WSBA 11122
Attorney for Carlson

S/ Marcia M. Meade, for
Craig F. Schauermann WSBA 7396
Attorney for Schudels, Glass,
Thompson, Guaragna, Froese

S/ Marcia M. Meade, for
Thomas C. Phelan WSBA 11373
Attorney for Hopkins

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and am employed in the City and County of Spokane, State of Washington. I am over the age of 18, and not a party to the within action or proceedings. My business address is that of Dawson & Meade, 1300 W. Dean, Spokane, Washington 99201.

On February 14th, 1995, I served the within **Appellants-Plaintiffs' and Appellee Guaragna's Responsive Memorandum in Opposition to Appellees' Motion to Dismiss** on the parties in said action or proceeding by depositing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Spokane, Washington, addressed to the attorneys of record for said parties as follows:

James B. King
KEEFE, KING
W. 601 Main, 1102
Spokane, WA 99201

Joe G. Hollingsworth
SPRIGGS & HOLLINGSWORTH
1350 "I" St., N.W., 9th Fl.
Washington, D.C. 20005

Craig F. Schauermann
SCHAUERMANN & THAYER
1700 E. Fourth Plain Blvd.
Vancouver, WA 98661

Thomas C. Phelan
Attorney at Law
806 Officers Row
Vancouver, WA 98661

Executed this 14th day of February, 1995, at Spokane, Washington.

I declare under penalty of perjury, pursuant to the laws of the State of Washington, that the foregoing is true and correct.

s/_____
Marcia M. Meade

Organic Solvent Encephalopathy: An Old Hazard Revisited

Peter Houck, M.D., Diane Nebel, BA, and Samuel Milham, Jr., M.D., MPH

This report describes neurologic and respiratory symptoms among 26 engineers and contract laborers who used organic solvents and detergents to remove polycholorinated biphenyl contamination from a poorly ventilated factory basement. Neurologic symptoms included persistent central nervous system deficits, these developed in on worker after only 3 days. Respiratory symptoms included cough that persisted for more than 2 years. Laborers were more likely to report symptoms than were engineers. Appropriate ventilation or respirator use might have prevented the workers' morbidity. This incident serves as a reminder that organic solvent-related occupational illness continues to occur despite worker-health regulations and knowledge of preventive measures.
© 1992 Wiley-Liss, Inc.

Key words: occupational illness, enclosed space, dibenzofurans, reactive airway dysfunction, solvent exposures.

Division of Field Epidemiology, Epidemiology Program Office, Centers for Disease Control, Atlanta, GA (P.H.).
Environmental Health Office, Spokane County Health District, Spokane, WA (D.N.).
Washington State Department of Health, Olympia (S.M.).
Address reprint requests to Dr. Peter Houck, Indian Health Service, 2201 Sixth Avenue, Room 300, Seattle, WA 98121.
This work was performed at the Washington State Department of Health, Olympia, Washington. It was presented in part at the 1990 Epidemic Intelligence Service Conference, Centers for Disease Control, Atlanta, April, 1990.
Accepted for publication December 3, 1991.

© 1992 Wiley-Liss, Inc.

INTRODUCTION

Protecting workers against the effects of organic solvent exposure has been an occupational health priority because these compounds can cause neurologic damage [Morrow et al., 1990] and death [Browning, 1965]. Neurologic and respiratory symptoms developed among workers who used organic solvents and detergents in 1988 to remove polychlorinated bephenyl (PCB) contamination from a poorly ventilated basement. Protective measures were inadequate and not used consistently. We describe this incident as a reminder that easily preventable solvent-related occupational illness continues to occur in site of occupational health regulations and knowledge of protective measures.

BACKGROUND

In October 1988, a large multinational engineering corporation contacted to remove PCB contamination from part of a factory in Washington State. It provided a supervisory engineer and unionized engineers to work with unskilled, non-union laborers hired from another company. The supervisory engineer became ill 2 days after work began on October 15, was hospitalized, and did not return to the job. A series of engineers then directed the project.

The worksite consisted of five basement rooms with approximate volumes ranging from 187 to 210 m^3 that had been contaminated with PCBs from ruptured electrical capacitors. "Ventilation" was provided during the cleanup project by removing portions of the basement's ceiling; a nonvented fan was used intermittently to circulate air within the basement. Charcoal cartridge respirators were issued to the workers, although some reported receiving only paper dust masks.

Two organic solvent mixtures were used. One mixture contained alkylated benzenes (45%) and monoethanolamine (6%), and was applied as a foam. The other contained 1,1,1-trichloroethane (72%) and perchloroethylene (24%), and was applied as a spray. The vapors of both solvents are five times heavier than air, and will settle and accumulate in low-lying areas such as basements. Material safety data sheets (MSDS) provided with these products warned clearly that neurologic injury could

occur unless adequate ventilation or respirators were used, especially in low-lying areas. The two detergents used were applied as foam. Once contained sodium hydroxide; its MSDS recommended use of respirators if it was sprayed in enclosed areas.

On December 15, the day the PCB cleanup project ended, the supervisory engineer's illness was diagnosed serologiclly as legionellosis and was reported to the local health department and to the Washington State Department of Health Communicable Disease Epidemiology Office. This investigation was then undertaken because respiratory symptoms in other workers suggested a possible legionellosis outbreak.

SUBJECTS AND METHODS

Study Population

All 27 workers who were employed on the project were included in the investigation, although symptom and exposure data from the supervisory engineer are not included in this report because he worked for only 2 days before becoming ill. Of the other 26 workers, 14 (54%) were engineers and 12 (46%) were laborers; 21 (81%) were male. Their ages ranged from 20 to 61 years (median 43 years among engineers, 28 years among laborers). None of the laborers had previous experience with chemical cleanup, compared with 11 (79%) of the engineers. Project employment ranged from 3 to 58 days (median 24 days among engineers and 18 days among laborers).

Workers were questioned about symptoms and chemical exposure in person or by telephone between December 16, 1988, and February 28m 1989 and again in May 1989; later follow-up was through attending physicians. Factory officials provided data o their employee absenteeism.

Definitions

For this investigation, "persistent cough" was defined as self-reported cough that developed during the project and continued for more than 30 days after completion of work. "Memory change" was defined as self-reported memory impairment with onset during the project.

TABLE I. Prevalence of Symptoms in Laborers and Engineers, PCB Cleanup, Washington State, 1988

	Laborers (n = 12)		Engineers (n = 14)		Total (n = 26)	
Symptom	No.	%	No.	%	No.	%
Acute confusion	10	83	02	14	12	46
Headache	09	75	01	07	10	39
Memory change	04	33	01	07	05	19
Cough	12	100	07	50	19	73
Wheezing	08	67	02	14	10	39
Persistent cough	07	58	02	14	09	35

Laboratory Investigation

Sputa and sera were collected between December 17, 1988 and January 10, 1989 from a convenience sample of accessible symptomatic workers that exuded the original supervisory engineer. Microbiologic and serologic tests were done at the Washington State Public Health Laboratory. Sputa from 8 of the 19 workers with cough were tested for Legionellae by culture and direct fluorescent antibody staining. Unpaired sera from four of the workers with cough were tested for antibodies against Legionellae species, and from six workers with cough for antibodies against influenza virus, adenovirus, respiratory syncytial virus, and mycoplasma.

Sera from five of the workers with cough were tested for PCBs at the Washington State Pesticide Laboratory using gas-liquid chromatography with a detection threshold of 10 parts per billion (ppb). Sera from 12 workers (12 with cough, 10 with other symptoms) were tested for polychlorinated dizbenzo-p-dioxins (PCDD) and polychlorinated dibenzofurans (PCDF) at the Centers of Disease Control, Atlanta, using sequential gas chromatology/mass spectometry with a detection threshold of < 50 parts per trillion (ppt) [Patterson et al., 1987].

Four of the nine workers with persistent cough consulted an occupational medicine physician and were evaluated with mathacholine challenge tests. All five who reported memory change were evaluated by psychologists using batteries of quantitative neuropshychologic tests.

RESULTS

Clinical Findings

The frequencies of reported symptoms were: cough, 19 (73%); acute confusion while working, 12 (46%); wheezing, 10 (39%); headache, 10 (39%); persistent cough, 9 (35%); and memory change, 5 (19%). Laborers were more likely than engineers to report each of these symptoms (Table I).

The duration of "persistent" cough ranged from 31 days to 30 months (median 64 days) after job completion. One laborer was hospitalized with cough and dyspnea; all nine workers with persistent cough were treated with steroids of bronchodilator drugs. There was no increase in respiratory illness among factory employees of project workers' family members.

Individual chemical exposures could not be quantified reliably, because we did not learn of this incident until after completion of the project and also because detailed records of chemical use had not been kept. However, purchase records indicated that 55 gallons of organic solvent concentrated were used on the project; engineers estimated that 2-3 gallons were used in each shift when solvents were utilized. Solvents were not used simultaneously by all workers of in all parts of the worksite. Al least 50 gallons of detergent concentrate were used. Anecdotal reports from laborers indicated that the engineers spent less time in the basement using the cleaning agents than did the laborers.

Anecdotal complaints from both engineers and laborers indicate that work conditions were poor; ventilation was often inadequate, respirator use was minimal, skin protection was ineffective, and cleaning agents were reported to be mixed together and used in higher-than-recommended concentrations. One engineer reported that respirator use was sporadic and should have been mandatory; he left the basement frequently because of dizziness.

Laboratory Findings

No evidence of respiratory pathogen infection was detected in the sputa of sera of tested workers. No PCB's were detected in the tested sera. All sera tested for PCDDs or PCDFs contained the compounds , but at concentrations similar to those reported in the general population [Patterson et al., 1989].

Methacholine challenge tests were positive in three of four tested.

Neuropsychologic Test findings

Neuropsychologic test results were grossly abnormal in 2 of the 5 tested workers. The first, a 44-year-old laborer, developed headache, memory impairment, and acute confusion after 3 days of work, but did not lose consciousness. He used the solvent mixtures in an enclosed stairwell and denied receiving a charcoal cartridge respirator. His mental status had been clinically normal during a pre-employment physical examination performed 2 weeks before his solvent exposure, but was abnormal to the same examining physician after work on the project. The remainder of his neurologic evaluation, including computerized tomographic and magnetic resonance imaging scans of the head were normal. He had no history of neurologic illness, drug use, of previous organic solvent exposure. His condition is stable 3 years after exposure. He remains unable to hold his former job as a custodian and becomes list in his own neighborhood.

The second severely affected worker, a 24-year-old laborer, developed headaches, dizziness, and memory impairment after about 1 month of work, but never lost consciousness. His sister reported that his mental functioning changed in during the employment. He used all of the cleaning agent, but could not quantify his exposure. He denied receiving a charcoal cartridge respirator. Neuropsychologic testing performed 20 moths after job completion revealed deficits in attention, concentration, and memory. Three years after exposure he is unable to live independently and becomes lost in his rural hometown.

DISCUSSION

The neurologic symptoms experienced by these workers are consistent with those associated with organic solvents [Sandmeyer, 1981; Torleson and Rowe, 1981; Linz et al., 1986; Dick, 1988; Kruse et al., 1982; Morrow et al., 1990]. Although memory loss has been reported in persons exposed to PCBs, PCDDs, and PCDFs, a causal association has not be established [Proctor et al., 1988; Reggiani and Bruppach, 1985]. Most reports of solvent-related encephalopathy describe long-term exposure or ver high short-term exposure with loss of consciousness. It is relatively short periods of exposure without

loss of consciousness. Hypoxemia severe enough to cause permanent neurologic damage would result in unconsciousness [Adams and Victor, 1989]. Variable susceptibility to organic solvent neurotoxicity has not been demonstrated [Pelkonen, 1986].

Acute respiratory symptoms could have been caused by either of the organic solvent mixture [Sandmeyer, 1981; Deichman and Gerarde, 1969; Torkleson and Rowe, 1981], sodium hydroxide in one of the detergents [Proctor et al., 1988], or the detergents themselves [Kreiss et al., 1982]. The persistent cough may represent reactive airway dysfunction syndrome, a non-immunologic asthma-like condition that can follow acute exposure to a variety of respiratory irritants [Brook et al., 1985]. Although acute [Smith et al., 1982] and chronic [Warshaw wt al., 1979; Shigematsu et al., 1977] coughs have been reported with PCB and PCDF exposure, other studies have found no unusual respiratory symptoms among occupationally exposed person with serum PCB levels as high as 340 ppb [Chase et al., 1982, Maroni et al., 1981]. An infectious cause was not apparent; the supervisory engineer" legionellisis was probably acquired before the project began.

Adequate ventilation or consistent use of respirators probably would have prevented the workers' morbidity; both measures were clearly recommended in the MSDSs provided with the cleaning agents. What led to the particularly poor safety practices employed on this project is uncertain, although frequent changes of he symptoms was probably higher than that of the engineers because of more intense chemical exposure. Whether the laborers' lack of union membership contributed to particular unhealthy working conditions cannot be determined. Nonunion contribution workers have been reported to be generally less experienced, as in this incident, and to have poorer safety training and performance than union workers [Dedobbeleer et al., 1990], but another study found the relationship between unionization and workplace safety and health to be inconsistent [Taylor, 1987].

It is not possible to estimate how common incidents such as this one in Washington State, because there is no occupational illness reporting system similar to the communicable disease surveillance system that identified this problem fortuitously Experience in other states suggests that mandated reporting of occupational illness can identify remediable health hazards, even

though reporting ins incomplete [Centers for Disease Control, 1990].

CONCLUSIONS

The knowledge that organic solvents and other cleaning compounds can cause neurologic and respiratory problems is not new. However, the severe neurologic injuries suffered by workers in this incident are sobering reminders that easily preventable organic solvent-related occupational illness continues to occur in a highly developed country late in the twentieth century. Only the consistent application of recommended preventive measures will minimize the occurrence of incidents such as this.

ACKNOWLEDGMENTS

The author thank Paula Lantsberger, MD, for clinical data; Joyce Campbell, Michael McDowell, and Karna Towne for the microbiologic and serologic studies; Harol Ruark for PCB analysis; Larry Needham, PhD, and Donald Patterson, PhD, for PCDD and PCDF analyses; and Renate Kimbrough, MD, for suggestions during preparation of this manuscript.

REFERENCES

Adams RD, Victor M. (1989): "Principles of Neurology." New York: McGraw-Hill.

Brooks SM, Weiss MA, Bernstein IL (1985): Reactive airway dysfunction syndrome (RADS). Persistent asthma syndrome after high level irritant exposure. Chest 88:376-384.

Browning E (1965): "Toxicology and Metabolism of Industrial Solvents." Amsterdam: Elsevier Publishing Company.

Centers for Disease Control (1990): Occupational disease surveillance: Occupational asthma. MMWR 39:119-123.

Chase KH (1982): Clinical and metabolic abnormalities associated with occupational exposure to polychlorinated biphenyls (PCBs). J Occup Med 24.109-114.

Dedobbeleer N, Champagne F, German P (1990): Safety performace among union and nonunion workersin the construction industry. J Occup Med 32.1099-1103.

Deichman WB, Gerarde HW (1 969): "Toxicology of Drugs and Chemicals." New York: Academic Press.

Dick RB (1988): Short duration exposure to organic solvents: The relationship between neurobehavioral test results and other indicators. Neurotoxicol Teratol 10:39-50.

Kreiss K, Gonzalez MG, Conright KL, Scheere AR (1982): Respiratory irritaqtion due to carpet shampoo: Two outbreaks. Environ Int 8:337-341.

Kruse A, Borch-Johnson K, Pederson LM (1982): Cerebral damage following a single high exposure to carbon disulfide. J Soc Occup Med32:44-45.

Linz D, deGarmo P, Morton W, Wiens A, Coull B, Marcle R (1996): Organic solvent-induced encephalopathy in industrial painters, j Occup Med 28:119-125.

Maroni M, Colmbit T, Carboni S, Ferioloi E, Foa V (1998): Occupational exposure to polychlorinated biphenuyls in electrical workers. II. Health effects. Br J Ind Med 38:55-60.

Morrow LA, Ryan CM, Hodgson MJ, Robin N (1990): Alterations in cognitive and psychological functioning after organic solvent exposure. J Occup Med 32:444-450.

Patterson DG, Jr, Hampton L, Lapeza CR, Jr, Belser WT, Green B, Alexander L, Needham LL (1997): High resolution gas chromatographic/high resolution mass spectrometric analysis of human serum on a whole and lipid basis for 2,3,7,8 tetrachlorodibenzo-p-dioxin. Anal Chem 59:2000-2005.

Patterson DG, Jr, Fingerhut MA, Roberts DW, Needham LL, Haring Sweeney M, Marlow DA, Andrews JS, Halperin WE (1989): Levels of Plioychlorinated divenzo-p-dioxins and dibvenzofurns in workers exposed to 2,3,7,8-tetrachlorodibernzo-p-dioxin. AM J Ind Med 16:135-146.

Pelkonen O (1986): Host susceptibility in organic solvent toxicity. Prog Clin Biol Res 220:107-114.

Proctor NH, Hughes JP, Fischman ML, Hathway GL (1988): The chemical hazards. In Proctor NH, Hughes JP, Fischman ML (eds): "Chemical Hazards of the workplace. " New York: JB Lippincott, pp 136-144.

Reggiani G, Bruppach R (1985): Symptoms, signs and findings in humans exposed to PCB's and their derivatives, Envoron Health Perspecdt 60:225-232.

Sandmeyer EE (1981): Aromatic hydrocarbons, In Clayton GD,

Clayton EF (eds): "Patty's Industrial Hygiene and Toxicology." New York: John Wiley * Sons, pp 3253-3431.

Shigematsu N, Ishimaru S, Ikeda T (1977): Further studies on respiratory disorders in polychlorinated biphenyls (PCB) poisoning: Relationship between respiratory disorders and PCB concentrations in blood and sputum. Fukuoka Acta Med 68:133-138.

Smith AB, Scholemer J, Lowry LK., Smallwood AW, Ligo RN, Tanaka S, Stringer W< Jones M, Hervin R, Glueedk CJ (1982): Metabvolic and health consequences of occupational exposure to polychlorinated biphenyls. Br J Ind Med 39:361-369.

Taylor SG (1987): A reanalysis of the relation between unionization and workplace safety. Int J Health Serv 17:433-453.

Torkleson TR, Rowe VK (1981): Halogenated aliphatic hydrocarbons containing chlorine, bromine, and iodine. On Clayton GD, Clayton EF (eds): "Patty's Industrial Hygiene and Texicolgy." New York: John Wiley & Sons, pp 3433-3601.

Warshaw R, Fischbein A, Thornton J, Miller A, Selikoff IJ (1979): Decrease in vital capacity in PCB-exposed workersin a capacitor manufacturing facility. Ann NY Acad Sci 320:277-283.

Edward A. Dawson
Marcia M. Meade
Dawson & Meade
1300 W. Dean
Spokane, WA 99201-2090
(509) 328-4266
Attorneys for Plaintiff Merlin Carlson

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et. al., et ux.,	)	NO. 92-CS-0081-FVS
Plaintiffs,	)	
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	OFFER OF PROOF BY DR. DANIEL GOLDSTEIN
Defendants.	)	

STATE OF DENVER)
:ss
County of Denver)

Daniel Goldstein, being first duly sworn on oath, deposes and says:

1. I am a medical toxicologist. Attached as Exhibit A is a current copy of my curriculum vitae.

2. It is my understanding that the Defendants have challenged whether I am qualified to testify on the cause of Merlin Carlson's injuries from the 1988 exposure to chemicals at the PCB clean-up.

3. I have had my deposition taken over 3 days in connection with this litigation. In the first two depositions, I identified a significant amount of scientific literature as well as the

med-line research I performed on the solvents. See Exhibit B for the computer print out. I also identified the medical treatises I had in my office for consulting on the medical issues involved in the evaluation. In the third deposition, I again identified several binders filled with scientific articles on solvent exposure. See Exhibit C for the alphabetical according to author list of the above binders.

4. I also listed assorted text books that were available to me or available in my office including Hazardous Materials: Clinical Principles of Environment Health, ed. by John B. Sullivan, Williams and Wilkins, Baltimore (1992).

5. I also made reference to Dr. David Hartman's textbook, Neuropsychological Toxicology: Identification and Assessment of Human Neurotoxins, Pergamon Press, New York (1988).

6. Before my first deposition, Plaintiffs counsel attempted to provide Defense Counsel with a typed summary of my opinions. In the deposition I corrected where counsel had been in error in conveying my opinions. Exhibit D is a copy of that typed summary. In part the summary addresses some of the basics of the scientific literature.

7. In all three depositions neither Defense Counsel specifically asked what methodology I applied in arriving at my opinions. When given an opportunity to explain my opinions I attempted to do so.

8. I have an extensive background in toxicology, making me uniquely qualified to express opinions in this case. My background includes a Bachelor of Science in molecular biology. I have a Medical Degree from John Hopkins University. I have done a research and _____ fellowship in Clinical Pharmacology and toxicology. I have certification from the American Board of Pediatrics, American Board of Medical Toxicology and the American Board of Clinical Pharmacology. I have published in the areas of Pharmacology and Toxicology.

9. My practice includes Clinical Toxicology, Occupational and Environmental Toxicology, acute and chronic poisoning and Clinical Pharmacology. On a day-to-day basis I practice as a physician dealing with individuals that are exposed to neurotoxic substances including the chemicals present at the 1988 PCB cleanup at the Kaiser Mead plant.

10. Part of my practice involves advising employers on when and how they can provide protection to workers from toxic substances. I am familiar with many but not all government regulations as far as use of hazardous substances in work and in the environment. I am familiar with the scientific basis behind the regulations for protecting the worker and the environment.

11. I have reviewed extensive materials in connection with evaluating the injuries to Merlin Carlson and Dan Skeman. See as Exhibit B a list of materials that I have reviewed in connection with this.

12. Attached to this Offer of Proof as Exhibit E is a toxic exposure diagnostic strategy from Hazardous Materials Toxicology: Clinical Principles of Environmental Health, page 317. A brief study of the diagram will show that many different factors enter into evaluating whether a patient's problems are related to a toxic exposure.

13. I understand Defense Counsel have made broad statements as to the scientific basis of opinions about the etiology of Merlin Carlson's injury. For example I understand Defense Counsel has written:

> First, the literature validates only two scenarios from which an encephalopathy may result from exposure to certain solvents: (1) when an individual sustains chronic exposure to the solvent over a decade or more years; or (2) when an individual sustains a severe acute exposure to a very high level of solvent, and suffers an accompanying loss of consciousness. . . . Goldstein dep. tr. (9/2/93) at 129, 148-150 (agreeing that most reports of solvent-induced encephalopathy follow these two patterns); see generally Spencer and Schamberg, "Organic Solvant Neurotoxicity," 11 Scand J. Work. Environ. Helath 53 (1995) (review of solvent neurotoxicity evidence). See Defendants Memorandum of Points & Authorities in Support of Joint Motion In Limine On Encephalopathy Claims page 24.

Defense Counsel has taken my deposition testimony out of context. Defense counsel has also identified some journal publications, which I shall address.

14. Attached as Exhibit F are pages 129-134 of the 9-2-93 Deposition. The answer in context does not stand for what Defense Counsel is asserting in their Brief.

15. Below I shall address in more detail the scientific literature as to the etiology of Merlin Carlson's injury.

16. I have seen that Defense Counsel is citing Drs. Spencer & Schumberg, "Organic Solvent Neurotoxicity: Facts and Research Needs. Scand. J. Work. Environ. Health, 11.supp.1:53-60 (1985) as authoritative on toxic encephalopathy. From a scientific standpoint such a conclusion is in part misleading. First, the article is directed towards what research is needed in connection with solvent exposures. Drs. Spencer & Schumberg were urging doctors to use a logical scientific method in reporting incidents of solvent induced encephalopathies. Second, the article is not a review of all the scientific literature available on solvent induced encephalopathies. Drs. Spencer & Schumberg recognized "This brief survey demonstrates that certain aliphatic and aromatic solvents are proved neurotoxicants in humans and animals. . . . Many other solvents and solvent mixtures are suspect human neurotoxicants and, remarkably, the majority of solvents in daily use has yet to be tested for chronic neurological effects in experimental animals." Id. 58-59. Drs. Spencer and Schumberg conclude their call for research with the following:

> The degree of reversibility depends principally on the type and extent of neurological damage: peripheral nerves generally regenerate, whereas lesions of the brain and special sense organs are more often associated with permanent deficits. Taken together, these principles should be useful to identify other solvents with neurotoxic potential so the future human exposure to harmful concentrations may be prevented." Id. 59.

17. Drs. Spencer & Schumberg call for more research was published in 1985. There has been considerable scientific research published as to solvent exposure and neurotoxic injuries over the last 9 years.

18. In an every day medical practice a competent physician does not await for a scientific article to be published

regarding the patient's present condition to be published before he or she determines the probable etiology of a patients condition. Rather, a physician uses a patient's history, physical examination, tests and what-ever scientific literature might be available to arrive at a diagnosis of patient and determine etiology. With neurotoxic insults this methodology is supported by the scientific authors relied upon by Defense Counsel. Drs. Schaumburg and Spencer have an article entitled "Recognizing neurotoxic disease" Neurology Vol. 37: 276-278 (1987). These doctors note:

> **The investigation of suspected neurotoxic disease.** A focused history is the cornerstone of the neurotoxicology clinical evaluation. The history alone often establishes or strongly suggests a diagnosis of toxic disease.

The history available on Merlin Carlson and the workers at the 1988 PCB clean-up is consistent with a neurotoxic insult.

19. Drs. Schaumburg and Spencer also point out other factors in recognizing neurotoxic disease. Those factors include: 1) Neurotoxic chemicals associated with nervous system degeneration rarely destroy focal areas of the CNS or PNS. i.e. the damage is more global; 2) Exposure to different levels of the same substance may result in a dramatically different clinical picture; 3) Neurotoxic illness usually occurs concurrent with exposure or following a short latency; 4) An agent without known neurotoxic activity may enhance the toxicity of a known neurotoxin that is present at a "no-effect" level; and 5) "Asymptotic toxic disease of the nervous system occurs and, under certain circumstances, may be widespread. Unless a consistent, high-level intellectual activity, a modest decline in performance may go unnoticed. An analogous phenomenon has been described in workers with subclinical toxic neuropathies who deny an disability despite sensory dysfunction obvious to their spouses."

20. I have utilized a recognized scientific processes in analyzing the information provided to me. A systematic approach in evaluating toxic causation would include:

a. Defining the exposure;
b. Evaluating the exposure dose response relationship;
c. Evaluating the temporal relationship;
d. Evaluating latency periods;

e. Evaluating known association of disease by chemical;
f. Evaluation of the pathophysiology; and
g. Considering confounding factors and risk modification factors.

21. Many of the medical treatise on toxicology have sections devoted to the scientific analysis of exposure to toxic substances. For example the above method for analyzing the etiology of a potential toxic exposure is one scientific recognized method. See Hazardous Materials Toxicology: Clinical Principles of Environmental Health.

22. In routine toxicologist practice, patients are frequently referred to neuropsycholgist for evaluation. It is part of a toxicologist's methodology in working up a patient to refer to a neuropsychologist for testing. The toxicologist and neuropsychologist and perhaps other health care professionals collaborate in diagnosing a patient's condition.

23. In deposition I identified Dr. Larry W. Welch's "Chronic neuropsychological and neurological impairment following acute exposure to a solvent mixture to toluene and methyl ethyl ketone (MEK)", Clinical Toxicology, 29(4): 435-445 (1991). See Exhibit G. A worker was exposed to solvents in an unventilated room on only two separate occasions. He had with exposure he had symptoms of dizziness and headaches, but did not lose consciousness. He began to note concentration and memory difficulties. His wife provided history that the worker lost the ability to carry out daily activities containing sequential steps. He had continued complaints of headaches, respiratory distress, feeling "weak and tired", shortness of breath, appetite and sleep disturbances and loss of libido. From this history neuropsychological and neurological test were performed. The testing documented impairment. After analyzing the history and testing it was determined that the worker had brain damage from an acute exposure to solvents.

24. I have attached Exhibit G, which is Dr. Welsh's paper is not only illustrative of "solvent" induced encephalopathy, but also of the methodology used by physicians in determining the etiology of a disease.

25. In reviewing the materials it is my understanding that the following cleaning products were used at the 1988 PCB cleanup: Capsur (R), HDD Heavy Duty Degreaser, alkaline

cleaner (HDD), power cleaner, Seaport, CRC heavy duty cleaner,

26. I also was provided portions of deposition testimony, in which workers were describing how these chemicals were being used. The depositions also described the symptoms the workers were manifesting at the time of using these chemicals. Since my deposition I have also been provided the 16 page report of Dale Haskin's. A sopy of Dale Haskin's report will be attached as Exhibit H.

27. I have reviewed the Material Safety Data Sheets (MSDS) from the above chemical agent. There are several known neurotoxic agents present in the chemicals. They include, 1,1,1 trichloroethane, (methyl chloroform), perchloroethylene (tetrachloroethylene), aromatic hydrocarbon mixtures including naphthalene and 1,2,4 trimethylbenzene, ethylene glycol, monethanolamine.

28. I have reviewed the Offers of Proof as to Dr. Cripe and Dr. Beaty. I am in agreement in their analysis and description of the scientific literature.

29. In inquiring of me, defense counsel made reference to the fact that there was no trichlorethylene originally contained in the cleaning products. However, that does not mean that all of the scientific literature on trichloroethylene may be ignored. 1,1,1 Tricholoroethane, perchloroethane and trichlorocthylene are all chlorinated hydocarbons. The scientific literature documents that the neurotoxic effects of these chlorinated hydorcarbons is similar. With some chlorinated hydrocarbons there maybe further unique biological effects. Trichloroethylene can be created by mixing an weak acid with perchloroethane.

30. From the information provided there is no question Merlin Carlson was exposed to neurotoxic chemicals. Merlin Carlson's complaints at the time of the exposure and after the exposure are consistent with a toxic dose of these chemicals. Further the complaints of the other workers at the time of exposure are corroborative of an exposure to toxic chemicals.

31. In item 1 of Exhibit I, organic solvents are defined. At page 420 of item 1 in Exhibit I, it states:

> Hydrocarbons are derivatives of petroleum distillation, the major class of which includes straight chain saturated and unsaturated aliphatics, cyclic,

> and halogenated hydrocarbons....There are five major clinical syndromes caused by exposure to hydrocarbon products: skin toxicity, gastrointestinal toxicity, pulmonary toxicity, central nervous system toxicity, and generalized systemic toxicity. Acute or chronic exposure to hydrocarbons can result in significant skin injury. Hydrocarbons are directly irritant to the epidermal tissue and as a consequence of their high lipid solubility may cause dissolution of fatty tissues and penetration of cell membranes.

32. In lay terms "lipid" is referring to fat. The nerves and brain tissue have a significant amount of fat cells associated with the tissue.

33. I have reviewed and considered the peer reviewed the article "Organic Solvent Encephalopathy: An Old Hazard Revisited", Houck, P., Nebel, D., and Milham, S. American Journal of Industrial Medicine, 22:109-115 (1992). This article documents neurotoxic exposure of Merlin Carlson and the other workers at the 1988 PCB clean-up. This article was published in a peer review journal, indicating that it is of acceptable scientific quality as to its' data and conclusions.

34. I have also reviewed the underlying data collected by Spokane County Health Department and the Washington State Health Department. The information collected by the Health Departments is the type of information a toxicologist would consider in evaluating a patient. The initial information collected by Ms. Nebel is impressive, since the workers did not know about the connection between their symptoms and toxic encephalopathy. The article is additional scientific research documenting solvent exposures causing encephalopathies.

35. In Houck's article a question is posed as follows:

> Most reports of solvent-related encephalopathy describe long-term exposure or very high short-term exposure with loss of consciousness. It is uncertain why persistent neurological deficits developed in two workers following relatively short periods of exposure without loss of consciousness.

Apparently, at the time this article was published Dr. Houck did not know about the reports from fellow workers about Dan Skeman's and Merlin Carlson's loss of consciousness.

36. Drs. Spencer and Schumberg identified in "Recognizing Neurotoxic Disease", "Acute intoxications associated with altered sensorium or cognitive state pose a formidable challenge because a history may be unobtainable." see page 277. A person, who has come under the intoxication of chlorinated hydrocarbons, may not realize he has had a change in a level of consciousness or much less a loss of consciousness. It maybe that the exposed worker does not realize or remember what has happened to him or her. The workers questioned by the health department may just not have remembered or realized there was a change in their level of consciousness. Fortunately, other workers were able to provide other aspects of the occupational history of the 1988 PCB clean-up. In a routine medical practice toxicologist do rely on occupational history received from co-workers. From the information made available to me both Mr. Skeman and Mr. Carlson have documented losses of consciousness.

37. The Spokane County Health Department and Washington State Health information on the exposure symptoms of the workers is supportive of Merlin Carlson's injury. The main symptoms reported were respiratory, dermatitis and central nervous system disorders. See Diane Nebel's report.

38. The pertinent individual symptoms listed for group of workers were as follows: Headaches - 67%, Cough - 83%, Productive Cough - 54%, Diarrhea - 29%, Chest Pain - 38%, Rash - 58%, Abd. Pain - 38%, Muscle Pain - 8%, Vomit - 21%, Nausea - 50%, Memory Loss - 13%, Confusion - 8%, Dizzy - 21%, Faint - 13%.

39. Merlin Carlson was interviewed by Diane Nebel in December 1988. In Diane Nebel's investigative records indicate Merlin Carlson had the following pertinent symptoms: Headache, Dry Cough, Light Headed, Dizzy, Disoriented, Rash, and Breathing Problems when working.

40. 1,1,1 trichloroethane is a chlorinated hyrdrocarbon. Trichloroethylene is a chlorinated hydrocarbon. Perchloro-ethylene is chlorinated hydrocarbon. Chlorinated hydrocarbons are also referred to as halogenated solvents. All of these chemicals are in the same family are physically and chemically

similar. They affect the central nervous system similarly. That is "all of the halogenated solvents are central nervous system depressants that produce dose-related changes in metal function and consciousness depending on the individual chemical and the duration of exposure". Hazardous Material Toxicology: Clinical Principles of Environmental Health page 736. Further, "central nervous system depression develops following exposure to high doses of all of the halogenated solvents, and most initial deaths result from respiratory depression and subsequent hypoxia." Id p. 739. Acute systemic toxicity to halogenated solvents present clinically as:

> "All the halogenated solvents are classic CNS depressants that may produce some initial excitation followed by depression of the central nervous system. The type and onset of symptoms depends on the duration of exposure, concentration, previous exposure history, minute ventilation, and individual susceptibility. Following inhalation of high doses of these chemicals, the rapid onset of central nervous system depressions may occur manifest by dizziness, ataxia, headache, fatigue, lethargy, nausea, and abdominal pain that progresses to stupor, apnea, coma, and death." Id. 741

41. The basic central nervous system toxicities of these chemicals are essentially interchangeable. Attached as Exhibit ___ is table 64.2 from Hazardous Materials Toxicology: Clinical Principles of Environmental Health, which list the threshold levels for these chemicals. Id. p. 736 The chemicals only vary as to degree of toxicity as to their particular dosages. On top of their general toxicity, certain of these chemicals may have individual toxicities. For example trichloroethylene can cause trigeminal nerve complications. (The trigeminal nerve is in the face.)

42. The MSDS's of the cleaning products used at the 1988 PCB cleanup indicate that there was 1,1,1 trichloroethane (methyl chloroform) and perchloroethylene (tetrachloroethylene) present

43. Attached to this Offer of Proof are photocopies of table 6.4 from Hazardous Material Toxicology: Clinical Principles

of Environmental Health. I have highlighted for the Court the chemicals involved here. This is done for the Court's benefit as to identifying basic information such as the chemicals' various names, their NIOSH numbers, their molecular weight and their structural formula.

44. Chlorinated hydrocarbons, halogenatic solvents, are also known as organic solvents.

45. Most of the halogenatic solvents were discovered in the 1800's and were initially investigated as anesthetic agents. Over the years many of the halogenatic solvents fell out of use as far as anesthetic agents because of their hepatotoxic properties.

46. The breaking down of these chemicals when exposed to heat, light and other chemicals is important. For example, the addition of weak acids to tetrachloroethane (perchloroethylene) produces trichloroethylene.

47. There is extensive literature on trichloroethylene producing neurotoxic injuries to workers.

48. In evaluating Merlin Carlson's injuries, I have taken into account his past medical history including his prematurity, his school records and his work history. It is my opinion on a more probably than not basis that the aromatic hydrocarbons, the chlorinated hydrocarbons, and the other chemicals used in the 1988 PCB cleanup injured Merlin Carlson.

49. The pulmonary route is the main source of toxic exposure to halogenatic solvents. Chemicals such as 1,1,1 tricholorethane, perchloroethylene and any by products such a trichloroethylene and well absorbed through both the lungs and gastrointestinal tract. The speed of absorption depends upon the transfer of the chemical through the pulmonary capillaries into the blood and the concentration of the chemical in the blood.

50. Given the fact that Merlin Carlson was found "passed out" at one point more probably than not he had reached a peak level of exposure to one of these chlorinated hydrocarbons. Since chlorinated hydrocarbons are central nervous system depressants, reports of loss of consciousness indicates there were high levels of chlorinated hydrocarbons present. More probably than not Merlin Carlson was exposed to ranges of tetrachloroethane, 1,1,1 trichloroethane and the by product trichloroethylene in amounts greater than the threshold value limits.

51. More probably than not the impairments and

behavior changes noted by Drs. Beaty and Cripe were caused by Merlin Carlson's unprotected exposure to the solvents and other chemicals used at the 1988 PCB cleanup.

55. Tetrachlorethane has a prolonged elimination time. Neurological signs and symptoms following tetrachloroethylene may be delayed several hours and may last for several days. The signs and symptoms of tetrachloroethylene also include mental confusion, disorientation, poor concentration, dysarathria, ataxia, amnesia, dysphasia and numbness. Exposure to tetrachloroethylene and the potential by product, trichloroethylene has been associated with central nervous system including headaches, irritability, emotionality, personality change, fatigue and anxiety. There have been individual case reports associated with the development of peripheral neuropathies with work place exposure to 1,1,1-trichloroethane. See Liss, G.M. "Peripheral Neuropathies In Two Workers Exposed To 1,1,1-Trichloroethane," Journal of the American Medical Association, 260 2217 (1988).

53. I have considered all of Merlin Carlson's medical history as well as his exposure history at the 1988 PCB clean-up. I have specifically considered the issue of Merlin Carlson's prematurity. It is my professional opinion that the impairments noted by Drs. Beaty, Cripe, and Lantsberger were more probably than not caused by the unprotected exposure to the chlorinated hydrocarbons, solvents, aromatic hydrocarbons, and other chemicals present at the 1988 PCB clean-up.

54. My professional opinions are based upon the information above, the material I reviewed in connection to Merlin Carlson, Dan Skeman, and was listed in three depositions taken of me, as well as my education, experience, knowledge, and background.

s/_____
Daniel M. Goldstein, M.D.

SUBSCRIBED AND SWORN to before me this 13th day of January, 1994.

s/Melody M. Winter
NOTARY PUBLIC in and for the State of Colorado residing in Denver.
Commission Expires: 5/17/97

Marcia M. Meade
Edward A. Dawson
Dawson & Meade
1300 W. Dean
Spokane, WA 99201-2090
(509) 328-4266

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et. al., et ux.,	)	NO. 92-CS-0081-FVS
Plaintiffs,	)	
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation, and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	DECLARATION OF SAMUEL MILHAM, JR. ON OFFER OF PROOF
Defendants	)	

Samuel Milham, Jr., M.D. declares and states:

1. I am a physician licensed by the State of Washington. I am an epidemiologist. A copy of my Curriculum Vitae is attached as Exhibit A.

2. I have numerous degrees and experience in the area of science, including a background in chemistry.

3. I received my first medical degree in 1958. I have a Masters of Public Health Degree from John Hopkins School of Hygiene and Public Health 1961. I have extensive post-graduate study in epidemiology. In 1966 I became an diplomate of the American Board of Preventive Medicine.

4. I have worked and taught in the area of chronic disease epidemiology for the last 32 years.

5. I have worked for the State of Washington Health Department in various capacities in the epidemiological section.

6. I have special interest and experience in the area of occupational and environmental epidemiology.

7. I have published over 65 articles in various peer review journals primarily in the area of epidemiology and occupational health.

8. I have worked extensively with the industrial community of the State of Washington in occupational health.

9. For over ten years I have conducted a mortality monitoring at the Kaiser plants in Spokane. A mortality monitoring study is a type of epidemiological investigation. This area of my investigative experience was discussed in the deposition. I am familiar with occupationally caused diseases and injuries in Spokane, Washington.

10. In my various professional capacities for the State of Washington, I have conducted Health Hazards Evaluations and epidemiological studies with and for most the major industrial employers in the State of Washington, i.e., Boeing, Kaiser and Weyerhaeuser. I am familiar with and have had experience with workers who have been exposed to organic solvents. I have professional experience in investigating the health implications of workers exposed to organic solvents. I am familiar with the chemicals used in the 1988 clean-up at the Kaiser plant.

11. I am familiar with state and federal regulations that were and are designed to protect workers from injuries from exposure to hazardous chemicals.

12. I am familiar with and have conducted numerous of epidemiological investigations of occupational caused diseases.

13. I am familiar with and have conducted numerous of investigations, where there is a question of toxic injury to workers.

B. GENERAL METHODOLOGY OF EPIDEMIOLOGY

14. I have been advised by plaintiff's counsel that the court needs to review the methodology that I applied to the investigation of the 1988 PCB cleanup at the Kaiser-Trentwood Plant in Spokane, Washington. Further, I have been advised that the court is questioning the methodology that was applied to the peer review article which was is entitled: "Hazardous Solvent Encephalopathy: An Old Hazard Revisited" by Peter Houck, M.D., Diane Nebel, B.A., and Samuel Milham, Jr., M.D., MPH, American Journal of Industrial Medicine, Vol. 22, 109-115

(1992).
A copy of the article is attached as Exhibit B to this Declaration.

15. In general terms Plaintiff's counsel has explained to me the law of a case Daubert v. Merrell Dow. From my understanding of the law, the Court is askING for the same creditability scientists ask from one another in scientific research and publications.

16. The question of whether my opinions are logical scientific conclusions have previously been addressed by my peers. The Health Hazard Evaluation that we performed at Kaiser was a state of the art investigation. We followed the format used by NIOSH. The results of our investigation were scrutinized by the editorial board of the American Journal of Industrial Medicine. They found our scientific methodology to be sound. They published our article. The health effects of these chemicals has previously been scientifically established. I point the Court to the Material Safety Data Sheets (MSDS's). The MSDS's on the chemicals are as a result of previous investigations, studies and scientific documentation of the effect of the individual chemicals on persons.

17. In conducting the Health Hazard Evaluation in 1988 we used a standard medical process known as a differential diagnosis. The Health Hazard Evaluation was originally conducted because there was a reported case of Legionella. We ruled out Legionella infection. We ruled out PCB's as being the cause of the workers' complaints. The only other agents left were the solvents and detergents used in the clean up. The solvents and detergents used in the clean up are scientifically known and documented as causing the type of conditions that some of the workers had. I shall now discuss my methodology in more detail for the Court.

18. I am familiar with a court's need to know the methodology that I have applied. In my work for the State of Washington the methodology applied to my investigation has been reviewed and presented to a variety of tribunals as well as legislative committees.

19. To concisely present this information, I have referred Mr. Dawson to the textbook, Primer of Epidemiology, by Dr. Gary D. Freedman, McGraw-Hill Book Co., New York 1974. This is a basic textbook, which would be used by a medical

student or a medical practitioner. I use this textbook to teach students.

20. I have suggested that counsel purchase this book, so the book can be made available to the court in the event there is a question about my offer of proof and the authority for my statements.

21. Epidemiology is a well-established area of medical science. The methods used in epidemiological studies have been extensively researched and validated. Basic epidemiological methods are taught to every medical student in the United States.

22. Epidemiology is fundamental to medical science. However, epidemiology is different from the clinical practice of medicine. Epidemiology involves groups of people, where clinical medicine involves individual patients. In epidemiology the individual patients are scientifically investigated. Then the entire group of patients and the results of the investigation are studied.

23. Epidemiology is intimately involved in the clinical practice of medicine. Treating physicians regularly use epidemiological knowledge in the diagnosis and treatment of diseases in patients. For example, epidemiology investigations are conducted as drug trials and to evaluated various medical treatments. Another example is the body of medical knowledge concerning AIDS. Epidemiological studies were conducted to determine who had the syndrome and what habits were associated with development of the syndrome. From the epidemiological studies other medical scientists began looking for an infectious agent as the cause of AIDS. Without epidemiological studies medical science would be in the dark ages.

24. An epidemiological investigation is based upon the observation of natural differences in exposures on the outcomes among subjects. From the questions that were asked of me in the deposition, there may be some confusion between an epidemiological investigation, such as Health Hazards Evaluations, and experimental studies.

25. In a true experimental design the treatment or exposure is entirely under the control of the investigator. In contrast epidemiological studies do not control the exposure or treatment, but instead control the selection of study subjects and the method of analysis.

26. An epidemiological investigation plays an important

role in the science of medicine in determing the cause of toxic disease. For it is simply not feasible, or necessarily ethical, to consider conducting experiments on humans to learn the cause and effect relationship between toxic chemicals and exposure.

27. The Health Hazard Evaluation done on the 1988 PCB clean up was routine. Usually Health Hazard Evaluations are done when workers contact NIOSH or state health departments about contamination or exposure to toxic chemicals. Then a Health Hazard Evaluation is performed. Here the only difference is that the health department was contacted to perform a Health Hazard Evaluation of a potential Legionella out break. In investigating we found that there was not an out break of Legionella in this group of workers. The Health Hazard investigation was modified to address what the source was of the workers' complaints. It is not unusual for the investigators to consider other sources of hazards than the source originally suggested.

29. Studies of exposures to toxic hazards can be classified in three different categories: 1) descriptive, 2) etiological or analytical, and 3) interventional.

30. Descriptive studies record the occurrence of illness or effect in individuals under different exposures. These types of studies are frequently used in regard to the cause and effect relationship between hazards and exposures. Descriptive studies are used for identifying risk factors; identifying trends; identification of the theory of the cause and effect relationship of exposure; and for determining background levels of chemicals.

31. Etiological or analytical studies are an attempt to establish a causal relationship between hazards and disease or toxic conditions. These types of studies provide a temporal ordering of cause and effect control of confounding factors and identify consistency with the plausible mechanistic theories. These types of studies also denominate dose-effect relationship.

32. Intervention studies are used to support a cause and effect inference. They are used to establish successful programs designed to control toxic hazards.

33. If one wanted to do some specific reading on epidemiology, biostatistics and toxicology, I would refer you to an Introduction to Epidemiological Methods by Kahn, H.A., Lilienfeld A.N., Editor, Monographs in Epidemiology and

Biostatistics. New York: Oxford University Press (1983). Modern Epidemiology by Rothman K.G., Little Brown, Boston, 1986 and Statistics for Toxicology, Salisburg, D.S., Bekker New York 1986, and Chapter 6 by Steve Piantotadosi, M.D., Ph.D., Epidemiology and Principles of Surveillance Regarding Toxic Hazards in the Environment from Hazardous Materials Toxicology: Clinical Principles of Environmental Health, Editors, John B. Sulivan, Jr., and Gray R. Krieger, Williams & Wilkins, Baltimore, 1992.

34. Research scientists, toxicologists, occupational medicine specialists and research epidemiologists attempt to estimate the increased risk that exposures to toxic substances pose to persons.

35. Epidemiological studies have provided medical science with a large body of knowledge as to the etiology of most diseases. In determining the cause of disease, epidemiologists have developed different scientific methods for analyzing relationships. One view of causation of disease, particularly infectious disease, is in tripartite term. The terms are 1) the agent, 2) the environment and 3) the host.

36. For example, in the 1988 PCB clean up, the hosts were the laborers and engineers. The environment included the Kaiser Trentwood Plant and what was in that environment. In the beginning the Health Hazard Investigation hypothesized the agent was Legionella. This was ruled out by laboratory tests. In the Health Hazard Investigation, it was apparent a group of the host had a common illness. We then began looking for other logical agents. An obvious agent was PCB. The PCB's were ruled out by exam and laboratory tests. The remaining agents were the solvents and detergents used in the clean up. We then gathered information on the health implications of the chemicals used. The data confirmed the chemicals used caused the illnesses the workers had. We then looked again at the host. We conducted 1) additional interviews; 2) reviewed all the medical and hospital records; 3) discussed the patients with the clinical physicians; and 4) had objective tests such as neuropsychological exams and methacholine challenge performed. Then we analyzed all our information again. See Exhibit B for a summary of the scientific analysis.

37. A second method of investigating the cause of the

disease is known as the "web of causation." The concept of "web of causation" is important in analyzing exposures to toxins.

38. In Dr. Freidman's, Primer On Epidemiology, there is a schematic drawing on the "web of causation" of myocardial infarction, heart attacks. This diagram has been attached as Exhibit C to this Declaration. In explaining a "web of causation" analysis it is important to consider that the development of a disease condition may be multi-factorial. In analyzing an incidence of toxic exposure an epidemiological investigation develops a similar "web of causation." The "web of causation" for toxic chemicals would consider some of the same factors as Exhibit C. In addition with toxic chemicals epidemiological studies also consider the chemicals at the site, exposure to other chemicals, the work conditions, personal protective equipment, and other known factors associated with the toxins.

39. Epidemiology may use both qualitative and quantitative measures. In epidemiology quantities are measured and descriptive terms are used to describe the groups of persons.

40. In considering basic measures of epidemiology there are counts, proportions and rates, prevalence rates, incidence rates and other rates such as mortality rates, morbidity rates and case fatalities.

41. In considering the counts, proportions and rates of disease, the epidemiologist is addressing qualitatively and quanatively the differences between groups of people.

42. Prevalence is a measure of existing cases in a defined population at sometime. Prevalence = number of existing cases divided by size of the population.

43. Incidence is a measure of new cases that arise in a population during a defined time interval. Incidence rates = number of new cases divided by population at risk by time interval.

44. Epidemiologists attempt to estimate the increased risk that an exposure to a toxic substance in the environment posses to an individual. A useful measure for this increased risk is known as relative risk. Relative risk = risk in exposed subject divided by risk of unexposed subject.

45. Assessing the risk of a chemical is a complex process. Attached as Exhibit D to this Declaration is a schematic drawing from Hazardous Material Toxicology: Clinical Principles

of Environment Health which identifies a risk assessment summary. This is put out by the U.S. EPA.

46. In working for the Health Department as an epidemiologist, I was involved in the identification and prevention of occupational diseases. The state had an interest in reducing the risk to Washington workers. Epidemiological studies are one method of identifying the potential risk.

47. As I mentioned above, it is frequently dangerous with toxic chemicals to conduct experimental studies. In investigating the risk of toxic injury the scientific method frequently used was an observational study. However this does not mean an Epidemiologist ignores previously performed experimental studies. An epidemiologist may consider the result of experimental studies in designing and analyzing the results of an epidemiological study. In designing an observational study an epidemiologist may also consider information that has been identified in environmental surveillance's.

48. In an observational epidemiological study one is describing the occurrence of the disease population.

49. Descriptive studies usually involve the determination of incidence, prevalence and morbidity rates for disease in population groups according to basic group characteristics. Group characteristics may include age, sex, race, work environment, and exposure to chemicals. Descriptive studies are used frequently in the epidemiology of chemical exposures in humans.

50. There are also prevalence or cross sectional studies. Prevalence or cross sectional studies examine the relationship between disease and other characteristics or variables of interest as they exist in the defined population at one particular time. The principles of prevalence and cross sectional studies are applicable to the present case. There are variables noted between the exposures of the laborers versus the engineers. In comparing the laborers to the engineers there were differences in the severity of exposure to chemicals and concomitant differences in the prevalence of symptoms.

51. The work for the State Health Department often involves descriptive study. This is because descriptive epidemiological studies reveal the pattern of disease occurrences in human populations. A descriptive epidemiological study

provides general observations concerning the relationship of the disease to basic characteristics. Basic characteristics include personal items such as age, sex, race, occupational, geographical location, time of occurrence of disease, and clinical presentation. The areas of descriptive epidemiology may be summarized under the categories of person, place and time.

52. In the present case, it is important to consider the factors of occupation, time of occurrence of disease and place.

53. Place is a matter of great importance. Place provides obvious clues to the etiology of a disease and serves as a reference point for investigation.

54. In the context of the Health Department, follow-up investigation is important. The Health Department may be working with the attending physician in considering what further clinical testing needs to be done of a particular person.

55. In this case we conducted an epidemiological Health Hazard Evaluation. The treating physicians have conducted clinical evaluation of the individual patients. While questions of disease etiology may be answered by studying population groups, clinical problems often require study of groups of patients. For example the efficacy of treatment can only be defined by studying groups of patients.

56. In epidemiology, the physician is concerned about error rates in collecting information. Since epidemiological information is foundational to medical science, the reliability of data and conclusion is of paramount concern. As such there are specific methods utilized by standard epidemiological studies to control for errors.

57. In making observations or measuring there is some degree of error. Accepting the fact that there is the potential for error, epidemiologists take error factors into account in interpreting their data.

58. In epidemiology error effects two important aspects of data quality, that is validity and reliability. Validity or accuracy is a measure of how closely the observations correspond to the actual state of affairs. Reliability or reproducibility is a measure of how closely a series of observations of match similar events or conditions. These two areas of potential error are considered in gathering data for Health Hazard Evaluation.

59. In the Health Hazard Investigation of the 1988 clean

up we controlled for errors. The following activities were done to control for errors. Identical questions were asked of everyone. We went back and did a second questioning. Doing second interviews are an example of replication. Replication is one method of controlling for error. We referred the workers to clinical physicians to corroborate what was being said and what we observed. We had additional objective tests done such as neuropsychological testing and methecholine challenge testing. We used the basic differential diagnosis process to direct our investigation. As I outlined above we first looked for Legionella's and ruled that out. We look for the possibility of PCB poisoning and ruled that out. We then looked to the other agents present in the environment of the laborers and the engineers.

60. Exhibit E is another schematic from Hazardous Material Toxicology: Clinical Principles of Environmental Health addressing elements of an evaluation. This schematic identifies some of the variables associated with chemical exposure. The source of this also is from the U.S. EPA. An epidemiological investigation of a chemical exposure would take such variables into account.

61. When the exposure is to toxic chemicals, there needs to be an investigation of what chemicals were at the site, what the air sources were, what the sources of contamination were. Additionally, there may need to be information collected on the clinical symptoms including: having 1) blood work drawn, 2) respiratory assessments, 3)neurological assessments, 4) neuropsychological assessments and 5) other clinical assessments recommended by treating physicians.

62. After this information is collected, assessed and evaluated, then scientific analytical principles are applied to all the available information.

63. In an epidemiological investigation the epidemiologist may be involved in the initial investigation by collecting basic data. Then the follow-up clinical data gathering is carried out by the treating physicians. In part this is done because follow up test may have risk associated with them. Further when a person is injured treatment is needed. A treating physician is in a better position to direct the care and interpret the responses to treatment. The epidemiologist takes the data collected by the treating physician and compiles it with the initially collected data.

C. Epidemiological Investigation.

64. A supervising engineer became ill the second day of the 1988 clean up. In the hospital he was tested for infections. It was reported he had Legionellosis. This is a reportable disease.

65. It was reported to the local health department and the Washington State Department of Health, Communicable Disease, Epidemiological Office. This is a condition that would normally promote a Health Hazard Evaluation.

66. In the normal course of these investigations a questionnaire is designed. Diane Nebel took that questionnaire and began questioning the workers. In questioning the workers she noted that the questionnaire was originally designed to ferret out evidence of a contagious disease such as Legionaries.

67. Ms. Nebel noted that there were significant reports of coughing and respiratory problems. She then appropriately contacted the State Health Department.

68. At that time Dr. Peter Houck from the CDC was working under me. I was supervising his work. Dr. Houck determined from laboratory tests that there was not an out break of Legionellosis among that population of workers. Dr. Houck and I discussed whether the out break of the illness had an occupational component.

69. There was a prevalence of these complaints among an identified group of workers who had some common variables. We began evaluating the common environment of the workers.

70. Those common variables included: that the workers were presenting with similar signs and symptoms; they had worked in the same environment; they had worked with similar chemicals; and, they developed the same symptoms during a similar time.

71. When there was a hypothesis reached as to an occupational component to the symptoms, I became personally involved in gathering the information. As I pointed out before my work for the state was directed to surveillance of occupational diseases.

72. In January of 1989, Dr. Houck and I came to Spokane. We examined and questioned workers. We also conducted an on site inspection of the work area.

73. We then reviewed the medical and hospital records, laboratory tests, the clinical findings, the neuropsychological tests

and the neurological test findings. From that information we identified an occupational component as an etiology of the worker's diseases.

74. As I previously mentioned, the results of our epidemiological investigation of the 1988 clean up were published in a peer review journal. This means that professional peers of Dr. Houck and I reviewed whether our article, "Organic Solvent Encephalopathy: An Old Hazard Revisited," was predicated upon a sound, scientific methodology.

75. My deposition has been taken on two occasions in regard to the investigation. I have provided all of the investigative information to defense counsel. I have discussed the individual items in the investigation. Additionally, I have personally and professionally reviewed all the data collected.

76. I am familiar with organic solvents. I am familiar with the known effects of organic solvents on humans. Over the years I have done mortality surveillance of workers exposed to organic solvents. Over the years I have done Health Hazard Evaluations of workers exposed to solvents, one of which has been published. This was discussed in my deposition.

77. Further over the years I have studied the Spokane workers at the Kaiser plants. In studies that have been published, I have included information collected on the workers at the Mead Plant and the Trentwood Plant.

78. As to the Kaiser Plants in Spokane, my formal cohorts studies have been of the Mead works and not the Trentwood works.

79. I have also published for NIOSH the findings in my epidemiological studies at the Kaiser Plants in relationship to aluminum reduction. There are also respiratory sequelae to some exposures to the aluminum reduction process.

80. In conducting the investigation of the 1988 PCB clean up, we used the acceptable standard methods of epidemiological investigation, identical to the Health Hazard Evaluations done by NIOSH.

81. As I mentioned, the investigation was first begun by Ms. Nebel. Many of the variables that she was collecting information on were variables that would not only be applicable to an infection, but they would also be applicable to a toxic exposure.

82. Once I became involved in the investigation, we gathered additional data as to the chemicals at the worksite. The particulars about the worksite such as it being in a basement with air volumes at approximately 187 to 210 square meters, what the ventilation was and what personal protective gear was available and used. We also collected information as to what the vapors would have been from the chemicals in relationship to the weight of air. There was also information from the MSDS's of the chemicals used. In collecting information we considered what type of injuries would be expected to be associated with toxic exposures to these chemicals.

83. The injuries expected would be one of the variables of our investigation. Generally those variables were broken down into body systems, i.e., respiratory and neurological. We also collected information from the attending physicians on the clinical presentation of the patients. The factory officials provided us data on the workers' attendance.

84. We also considered the fact as to whether the chemical exposures could be quantified reliably. Neither Kaiser Aluminum nor General Electric was taking air samples and we were not involved early on, we were not able to exactly quantify the exposure. However, we did review purchase records as to the amount of chemical that was purchased and used to clean up the site. That information was correlated with anecdotal reports from laborers as to who worked with the chemicals and their concomitant complaints.

85. We had additional investigative work performed in terms of laboratory investigations for pathogens and PCB's. There was also further clinical work done as far as respiratory system analysis and neuropsychological testing. The additional investigative work was by objective testing. The objective tests results correlated with the investigation observations. For example the neuropsychological testing confirmed the workers' memory complaints. See page 112 of Exhibit B.

86. With neurotoxic chemicals, one of the important measuring tools is that of neuropsychological testing. I understand that other witnesses in this case have provided the Court with extensive information as to standard neuropsychological testing in the face of neurotoxic exposures.

87. As part of our investigation we compared our data

with that of previously published peer review studies. Our epidemiological investigation results were consistent with previously reported studies. A list of those studies is reflected in the attached Exhibit B.

88. Our investigation of the 1988 PCB was essentially a descriptive study. Our investigation also through analysis established that the most likely cause of the illness observed in the worker was exposure to solvents used in the clean up. Table 1 in Exhibit B identifies the prevalence of the symptoms in the exposed persons. See page 111 of Exhibit B. In reviewing Table 1 the validity of our study is borne out by the fact that the laborers, who had more exposure to the chemicals had a greater prevalence of symptoms. Further the symptoms that were presented were the ones that one would expect to find when personal protective gear had not been used with exposures to these chemicals in a confined poorly ventilated space below ground.

89. I understand the defense may be confused about whether a cohort study should have been performed. A cohort study could not be done here. To do a cohort study, there needs to be 1) a single chemical involved and 2) a large group of persons exposed. A Health Hazard Evaluation as performed was the appropriate scientific approach to take in investigating this matter.

90. Given the reliable published literature on these chemicals, it was not scientifically necessary nor possible to do a cohort study. There has been extensive scientific study proving the individual chemicals cause the conditions documented in the workers at the 1988 clean up. The investigation was to identify, which of the workers were probably manifesting signs of toxic exposure to these chemicals. The investigation was published to remind the medical and industrial community that these injuries will occur if appropriate precautions are not taken.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED and signed this 2ND day of March, 1994 at Olympia, Washington.

/s/ _____
Samuel Milham, Jr., M.D.

Marcia M. Meade
Edward A. Dawson
Dawson & Meade
1300 W. Dean
Spokane, WA 99201-2090
(509) 328-4266

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF
WASHINGTON
MAR 07 1994
JAMES R. LARSEN, CLERK
_____DEPUTY

The Honorable Fred Van Sickle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

DAVID SCHUDEL, et. al., et. ux.,	)	NO. 92-CS-0081-FVS
Plaintiffs,	)	
v.	)	
GENERAL ELECTRIC COMPANY, a foreign corporation; and KAISER ALUMINUM CORPORATION, a foreign corporation,	)	OFFER OF PROOF BY PLAINTIFFS RE: THE TESTIMONY OF PAULA A. LANTSBERGER, M.D.
Defendants.	)	

The following Offer of Proof is submitted as to the witness PAULA A. LANTSBERGER, M.D.

DATED this 7TH day of March, 1994.

DAWSON & MEADE

/s/_____
Edward A. Dawson, WSBA #02911
Attorney for Plaintiff Carlson

PAULA A. LANTSBERGER, M.D., declares and states:

1. I am a physician licensed to practice medicine in Washington and Idaho.

2. Attached as Exhibit A is my Curriculum Vitae.

3. I have post-graduate work in Internal Medicine and Occupational Medicine. I practice in the area of Occupational Medicine.

4. As part of my routine practice, I am consulted by over a hundred employers on matters involving occupational health.

5. I am a physician who was consulted by Kaiser Aluminum and Chemical Company. I have done evaluation of workers for Kaiser here in Spokane.

6. At the request of the Spokane County Health Department I examined some of the workers involved in the 1988 PCB clean-up as an Occupational Physician.

7. I am a treating physician for Dan Skeman, Merlin Carlson, David Schudel, Timothy Schudel, Kathrene Froese, Craig Thompson, and Dan Glass.

8. I understand that extensive Offers of Proof have been prepared by other doctors involved in the investigation and evaluation of the workers in the 1988 PCB clean-up. My Offer of Proof will be less extensive since I assume the Court has been provided information on the basic science of toxic injuries.

9. I am familiar with the chemicals that were used in the 1988 clean-up. In my routine practice, I have evaluated individuals who have been exposed to the chemicals used in the 1988 clean-up.

B. <u>Occupational Medicine</u>:

10. My area of practice is Occupational Medicine. The majority of my practice involves the evaluation, treatment and care of persons in connection with their jobs. I have provided evaluation and consultation services for employers concerning the health issues of their employees. I have done pre-employment physical exams and screening of worker. I do periodic screenings of employees while they are employed. My practice also covers employees who are injured at work.

11. Employers often want pre-screening physical examinations and evaluations. Some of the reasons that employers want this information, are so that an employer can

appropriately evaluate whether a person is physically capable of handling the work, or they need base line information as to the physical and mental condition of a prospective employee.

12. When a worker is injured at work, I am a physician who manages the diagnostic process and treatment regime.

13. An occupational medicine physician is often a primary care physician. In the primary care role, an Occupational Physician often refers patients out for consultation and evaluation with other subspecialties.

14. As an Occupational Medicine physician I am familiar with the health implications of toxic materials.

15. I understand that defense counsel for Kaiser Aluminum and General Electric has suggested that the injuries that resulted from the exposure to chemicals in the 1988 PCB clean-up at the Kaiser Trentwood Plant, are undocumented events in the scientific literature. This is not true. The injuries sustained are the type scientifically expected when protective gear is not adequate or not used.

16. Over the last forty years, there has been extensive scientific research into the area of chemicals. Some of the major driving forces for the recent expansion and development of the scientific basis and the medical practice of treating toxic injuries have been addressed in the scientific literature. See attached Exhibit B[1]. Table 2.1, from Hazardous Materials Toxicology: Clinical Principals of Environmental Health, Edited by: John B. Sullivan, Jr., and Gary R. Kreiger, Williams & Wilkens, Baltimore, 1992, is just one example of information available.

17. For the Court's information, I will be referring extensively to Sullivan & Kreiger's Text in this Offer of Proof. I understand that this is a book that Plaintiff's counsel has purchased. It may make it easier for the Court to verify the information that I discuss in this Offer of Proof by referring to this text.

18. Along with many other materials, have studied this textbook and the information it imparts in detail.

19. In the practice of Occupational Medicine, I spend a considerable amount of my professional time keeping up with the current scientific literature in the area of Occupational Medicine and there related areas.

20. In Occupational Medicine, I work with a wide variety of subspecialties, including toxicologists, pulmonologists, nephrologists, internists, psychologists, psychiatrists, neuropsychologists, industrial hygienists, neurologists, orthopedists, chiropractors, physical therapists, occupational therapists, surgeons and most of the other areas of health care specialties.

21. For purposes of this Offer of Proof, I will focus my attention on toxic insults.

22. It is routine for Occupational Medicine Physicians to assess the potential of adverse effects from chemicals in the occupational environment. It is also routine for the physician to recommend the appropriate protection and precaution measures. Occupational physicians have more knowledge of toxicology than an average physician. I do not have as much knowledge as a toxicologist. When I have reached the limits of my knowledge, I consult with a toxicologist. As an Occupational Medicine Physician, I am concerned with activities relating to the study of the potential chemicals or mixtures of them and the harmful affect it may have on workers. In my scientific reading and continuing education, I have an ongoing study of the interaction between chemicals and the human biological system.

23. I am familiar with the current scientific literature on the chemicals used in the 1988 clean up.

24. I am familiar with the health issues relating to protecting the workers from injuries from these chemicals. I am familiar with the health implications of what happens to workers biologically, when they have not been protected from the chemicals. I am familiar with the diagnostic modalities for potential injuries from these chemicals. I am familiar with the current treatment regimes available for injuries caused by the chemicals in the 1988 clean up.

25. This area of toxicology is basic. There is extensive literature in this area. I keep myself apprised of the literature. I utilize the literature in planning, treating and evaluating the treatment of persons who have been injured from toxic substances.

26. I approached the evaluation and treatment of the workers in the 1988 cleanup as I would any other patients. I use the differential diagnostic process in evaluation and treatment.

The differential diagnosis process is basic to all areas of medicine.

27. In differential diagnosis process, the following activities take place.

28. A history is obtained from the patient. With injuries to workers the history is sometimes supplemented with information from family members, co-workers or other persons at the job site. History may also be obtained from other health care providers. Pertinent medical records are reviewed for information, e.g., emergency room records, pre-employment exams, etc.

29. The history obtained directs the physical exam. There are some matters that are routinely checked in all physical exams. The patient's complaint directs how detailed the exam is of certain organ systems. After the history and physical exam are done, appropriate laboratory tests and complications with other specialists are obtained.

30. The materials from the history, the physical exam, laboratory tests and consultations are reviewed and analyzed by myself. From all this information I arrive at what is known as a differential diagnosis. A differential diagnosis is a list of potential diseases or illnesses. Further history examination, laboratory tests or medical consultation is done to rule in or rule out the conditions and illnesses on the list.

31. As further evaluation and treatment are implemented, the list of potential conditions or illnesses may be reduced or expanded depending on what information becomes available in the process.

32. The process that I described is now basic medicine is practiced by most competent physicians in the United States.

33. In particular with chemical injuries as an occupational medicine physician, I consider the adverse effects that may be detrimental either to survival or normal functioning of a patient.

34. In considering the adverse effects of chemicals, I consider the chemicals or the by-product and what tissues or organ systems in the body they may potentially cause an injury to. For example, if a chemical is volatile and it can be breathed by inhalation, there are a variety of tissues and organ systems that may be impacted. The respiratory system may be effected. If the chemical crosses into the blood system it may effect the nervous

system, the cardiovascular system, the renal system, the digestive system or just about every system in the body. There may be local chemical burn injuries to the respiratory system whether it be in the nose, mouth, or down into the lungs.

35. My history taking and physical exams are directed towards observing for signs of toxicity.

36. With chemicals there may be differences in the signs of toxicity depending upon the magnitude, duration and route of exposure.

37. In assessing the patient's history and physical exam, I am looking for a dose response relationship between exposure and symptoms. Such a dose response relationship is important in determining the causal relationship between chemicals and the toxic effects.

38. With the number of chemicals in the modern work place, it is impossible for any physician, including myself, to have detailed information about particular chemicals on the top of our head. I have a general understanding of most groups of chemicals. However, with most patients part of my evaluation includes looking at the scientific literature specifically related to the family of chemicals involved in the workers' environment.

39. In evaluating Dan Skeman, Merlin Carlson, David Schudel, Timothy Schudel, Kathrene Froese, Craig Thompson and Dan Glass I specifically looked at the scientific literature on the families of chemicals involved at the work site.

40. When toxic chemicals are involved, I, as an occupational medicine physician, may see a group of patients, who have a range of common symptoms and a range of common exposure. I may use the information from one patient to assess and evaluate what is occurring in other patients. The information as to each patient is not compartmentalized in my evaluation.

41. Considering an entire group of workers with a toxic injury is a valuable medical assessment tool.

42. With neurotoxic chemicals this group consideration is invaluable. Often the most injured worker is unable to provide as detailed information as needed for a complete evaluation. The neurotoxic effects of the chemical interfere with the workers' ability to perceive, remember or report what happened. Workers that have had less of an effect from neurotoxic chemicals may be

in a better position to observe and report what happened in the common environment of the workers.

43. In the 1988 clean-up, I had some valuable baseline information as to the functioning of the workers. For example, Dan Skeman has been examined about eight weeks before he began working on the clean-up. I had baseline information as to his mental functioning, his lungs, his skin, his nervous system, and his general health. Daniel Skeman's health was significantly altered after exposure to the chemicals. Mr. Skeman was a marker or control for evaluating the impact of his experience on the other workers. The information that I garnered from my pre and post evaluation of Daniel Skeman was utilized in my evaluation and treatment of the other workers.

44. Occupational Medicine Physicians are frequently involved in assessing the potential of adverse effects from chemicals in the occupational environment. Occupational physicians are involved in making recommendations as to the appropriateness of protective gear and precautionary measures. As such, I am familiar with Material Safety Data Sheets (MSDS's), the various protective gear, and the reasons for the protective gear, and precautions.

45. In this case, as a physician, information that I often have available with other worker's injuries was not completely available here. For example, there was no monitoring of the air. There was no individual medical monitoring of the various workers for their dose exposure to the chemicals.

46. Since this information was not available, I had to go to additional means to extrapolate the relative exposure of the workers in relationship to the manifested signs and symptoms I observed and found.

47. The health hazard evaluations performed by Diane Nebel, Drs. Milham and Houck, were made available to me. Information from health hazard evaluations is used by Occupational Medicine Physicians. It is not unusual for an Occupational Medicine Physician to work with a Health Department investigation, or a Labor and Industries' Investigation of events at a work site.

48. I researched the scientific literature on the health implications of the chemicals that were present at the work site.

The scientific literature that I had pulled and reviewed in connection with the 1988 clean-up was made available in my depositions.

49. I point out to the court that in connection with this litigation, I have been deposed for days as to my evaluation, investigation, diagnosis, and treatment of all of these workers. The depositions of Dan Skeman were the longest and in the most detailed. I am assumed that counsel did not go into the same detail with the other workers, because I would have just been repeating myself in the subsequent depositions.

50. In searching the scientific literature for the health implications for chemicals, one cannot always find a specific study on a specific chemical. As a scientist, you look to the literature as to the family of chemicals. The health implications of chemicals are often interchangeable in a family of chemicals.

51. I understand that the Defendants are asserting there is no recognized authoritative basic scientific literature on the health implications of the chemicals involved in the 1988 clean-up. This is not true. Attached to this Declaration are several chapters from the textbook Hazardous Materials, Toxicology. I believe this is the most expeditious manner to identify for the Court that the health implications of these chemicals have been well research, extensively researched, and extensively published.

52. Attached as Exhibit B[2] is Chapter 64 from Hazardous Material Toxicology. This is a Chapter entitled Halogenated Solvents. The chemicals 1,1,1-trichloroethane and tetrachloroethene are halogenated solvents. This means they are organic solvents.

53. In evaluating the workers, certain chemical families are of particular concern. Two of the chemicals were 1,1,1-trichloroethane, (methylchloroform) and tetrachoroethane (PERC). Of further concern was a related chemical and trichloroethane, TCE. When certain other chemicals are also present and/or heat is present TCE can be produced in response to a chemical reaction. At the work site they were mixing chemicals. Chemical reactions would occur with the mixing of chemicals. Further TCE is expected impurity in most technical and commercial grades of halogenated solvents. See Exhibit B, Chapter 64, page 733.

54. Methylchloroform, PERC and TCE are halogenated

solvents. All these chemicals are central nervous system depressants. They cause dose-related changes in mental function depending on the individual chemical and duration of exposure.

55. There is scientific information available on concentration to which workers can be exposed short term without suffering: 1) there is sufficient change in level of consciousness to produce increased incidents of accidental injury; 2) chronic or irreversible tissue damage; and 3) respiratory tract irritation. The technical name for this safety level is threshold limit value -- short term exposure limit, TLV-STEL.

56. The TLV-STEL ratio and other similar ratio are part of the basis for determining what precautions and protective gear is needed. These levels are contained on MSDS.

57. The history I obtained is all the workers had changes in their level of consciousness while exposed to the chemicals. There were at least two workers, who were reported to suffer loss of consciousness. All the workers reported coughing and respiratory irritation. There were other symptoms of central nervous system decompensation noted in the histories, such as dizziness and blurred vision.

58. On the basis of the above more probably than not there were levels of halogenated solvents present in greater than minimal TLV-STEL amounts. As such it would be logical to expect a worker had suffered chronic or irreversible tissue damage.

59. With the above analysis in mind, I focused further history, physical exam, laboratory testing, referral to specialist and follow-up to rule in or out injury to the various target organs of halogenated solvents.

60. The above analysis also focused the supplemented scientific literature research I performed and considered.

61. The pathophysiology of halogenated solvents is well documented, i.e., see the attached chapters of one medical textbook. The diagnostic modalities for ruling in or out injury have been researched and validated. I utilized these methods in the patient work up.

62. In considering injuries I considered whether there were acute or chronic exposures. Based upon the histories, the amount of chemical used and the objective test, I believe on a

more probably than not basis the workers of the 1988 clean up had repeat acute exposures to halogenated solvents. With the repeat exposures there was a chronicity for some of the patients.

63. Central nervous system depression results from exposure to high doses of halogenated solvents. The histories indicated the workers suffered from varying degrees of central nervous system depression. To the extent possible from the history, I correlated the degree of change in consciousness with the nature of the exposure. With halogenated solvents deaths result from respiratory depression. Depending on the degree of respiratory depression there is a corresponding hypoxia. There is a correlation between the degree and duration of hypoxia with brain damage.

64. Postmortem examination of persons, dying immediately from toxic exposure to halogenated solvents, show nonspecific findings. With trichloroethane there have been documented findings of petechial hemorrhages in brain and lung tissue. Petechial hemorrhages are very tiny. See Exhibit B, Chapter 64 at page 741. In individuals who have not succumb to death, a MRI or CT scan may not show the petechial hemorrhages. The hemorrhages would be too small for the neuroradiologist to scan. For this reason the state of the art objective testing is neuropsychological testing.

65. Neuropsychological testing was performed on the workers. Some of the workers manifested significant cognitive injuries, others did not. With this type of cerebral insult there may also be concomitant or separate personality changes as well. The workers were screened for personality changes.

66. Halogenated solvents also effect the other organs of the body. The halogenated solvents probably contributed to the respiratory system injuries manifested by the exposed workers.

67. Also attached is Chapter 67 on Inorganic Acids and Bases. There are constituents of inorganic acids and bases in the chemicals used at the 1988 clean up, Exhibit C. Also attached is Chapter 68 on Organic Acids and Bases, Exhibit D. There were organic acids and bases at the worksite.

68. In the 1988 clean up, Kaiser and General Electric were apparently mixing together chemicals. There is no record of the ratio of how they were mixing together the chemicals other

than anecdotal. As far as I know there were no remaining remnants of the mixed together chemicals for evaluation. However, relying upon basic chemistry a physician can reasonably extrapolate that different chemicals were generated by mixing together the chemicals. It would be logical that as a result of the mixing together of these chemicals there would be organic and inorganic acids and bases released.

69. Exhibit E is Chapter 106 on Alkylbenzene Solvents and Aromatic Compound. Naphalene is in this family of chemicals. Naphalene was present in the chemicals used in the 1988 clean up.

70. These chapters provided to the Court are from recognized medical authorities. The chapters are set up with an overview of the chemical characteristics of the family of chemicals. A physician uses this information to evaluate and consider what potentially my happen to a worker exposed to the chemical. This information is also used to analyze and consider what potentially might happened if there are several chemicals in the environment. The chapters provide information about other things such as the diagnosis, treatment and prognosis from the exposure to the chemicals. Where applicable, there is information provided as to impurities in the chemicals. There is information provided on dose effects, whether it be from inhalation, dermal or otherwise. There is also information on what happens to these chemicals in the body as far as metabolism and on the various organ systems. There is information presented as to what one expects to see as far a clinical presentation of a patient acutely exposed to these chemicals or chronically exposed to the chemicals. The chapters also provide extensive references to public scientific journals on the family of chemicals.

71. I applied the same type of analysis as to the chemicals of other related organic solvents, such as aromatic hydrocarbons.

72. As Exhibit E indicates, there are similar health implications to this group of organic solvents as those of halogenated solvents. See table 106.1 at page 1088 in Exhibit E. The table summarizes the effects of solvent exposure. Also note a summary of the health implications and diagnostic measures. See pages 1099 to 1102 of Exhibit E.

73. The constellation of the workers signs and symptoms were consistent with the scientifically documented manifestations of solvent inducted injuries.

74. The textbook I referred to was not published at the time that I was initially evaluating the workers in the 1988 clean up. However, many of the articles cited to in the chapters were available. This would cover information that I gathered myself as well as had in my general library through years of acquiring information on chemicals.

75. In evaluating the workers I determined which, if any, specialist needed to be consulted for each patient. A patient's individual symptoms direct how consultation and testing is performed. There were some tests ordered and performed at the request of Dr. Samuel Milham. These were in connection with the Health Hazard Evaluation.

76. I also had discussions with Dr. Milham and Dr. Houck as to additional screening of the workers. Additional screening included having neuropsychological testing performed as well as methacholine challenge testing. With individual patient I have determined whether it was clinically appropriate to do this additional screening. As a physician I do not want to be wasting money on unnecessary testing.

77. The changes in Mr. Dan Skeman's mental capacity after the exposure to the chemicals, was profound and impressive. What Mr. Skeman manifested would be what one would expect from a significant acute exposure to neurotoxic chemicals such as the one at the work site. Mr. Skeman's changes in his mental capacity helped me assess the validity of the other workers' reports of memory problems and personality changes. The other workers manifested symptoms similar to Dan Skeman, but at a lesser degree.

78. In occupational medicine when there has been a toxic insult and there is a question of injury to the central or peripheral nervous system, it is state of the art to utilize neuropsychological testing.

79. Unlike a medical doctor, a neuropsychologist has specific in-depth training, education and experience in evaluating the impact on the brain of toxic insults.

80. With chemicals such as the ones in the 1988 clean up.

the damage may be microscopic. With microscopic damage it is not always possible to see that there is an injury with a MRI, CT scan or other such test. The damage to the brain is assessed the neuropsychological testing.

81. Neuropsychological testing has developed over the years. The tests are just as objective as an MRI or CT scan. They are just administered in a different way.

82. With the chemicals involved in this case, the mental impacts may be divided into several areas. The impact may be of cognitive functioning or behavioral functioning, or personality changes. There may also be a component of peripheral injury.

83. A significant amount of the literature that I reviewed and considered in connection with evaluating and treating these workers was in the area of neurotoxic neurobehavioral implications. There are two chapters in Hazardous Material Toxicology specifically related to this area. There is an extensive body of scientific literature as to these types of injuries. There have been several books published on them. The neurobehavioral and neurotoxic implications of these chemicals are covered in many other toxicology textbooks and occupational medicine textbooks.

84. Attached as Exhibit F is Chapter 13 from Hazardous Materials and Toxicology. The chapter is entitled Neurobehavior Toxicology.

85. Neurotoxic chemicals produce distinct forms of injury. Neurotoxic chemicals result in injuries that are either: 1) acute confusional state, characterized by rapid evolving deficits in arousal and attention; or 2) dementia, a persistent disorder of cognitive and emotional functioning; or 3) combination of both. See Exhibit F, page 154.

86. Attached as Exhibit G is Chapter 12 on Neurotoxicology from Hazardous Material Toxicology.

87. One of the significant presentations of all of these workers was the impact on their respiratory system. A significant majority of the workers had persistent coughs many months after the exposure. The respiratory problems of the workers have ranged in severity. I believe the range in severity is related to how much of the chemical they were exposed to in the confined space and whether or not they had personal protective gear available. In

the group of patients I saw a relationship between the degree of exposure and the severity of associated pulmonary and neurological problems.

88. In Hazardous Material Toxicology there is a wide variety of information available on pulmonary injuries. Chapter 38 addressed acute pulmonary injuries from hazardous material. There was information in that chapter that was helpful to me in evaluating individuals. However, I was not a physician actively involved in the acute phase of evaluation and treatment of these workers. Other doctors were involved in the acute phase of treatment and evaluation of these workers.

89. In reference to the acute injury there is one caveat. Since these workers were not provided information about these chemicals, I believe they were at a handicap in providing that information to the initial treating physicians. As such many of the initial treating physicians who were not occupational medicine physicians, probably did not think to ask about chemical exposure. I am placing no fault on these physicians, it is just a matter of specialty. If one does not work in the area of occupational medicine, one is not necessarily sensitive to all of the information that needs to be gathered in a history and evaluated as far as work injuries. Had I seen all these individuals on an acute basis, I would have been evaluating them for the acute respiratory response to toxic exposures to these chemicals.

90. My evaluation and treatment of the workers was in the role of the residual effects of the pulmonary injuries.

91. Based on the foregoing comments, I think it is appropriate to point out the Chapter 11 on Pulmonary Toxicology from Hazardous Materials and Toxicology. This chapter provides extensive information as to pulmonary implications of exposures to chemicals. It covers materials such as presenting signs and symptoms. The chemicals that are expected to effect the respiratory system. The manifestation of those effects. Suggestions as far as diagnostic tests and suggestions as to how those tests are interpreted. See Exhibit H.

92. Based upon my evaluations, testing, consultations and research, I believe that the workers in the 1988 clean up have varying degrees of injury to their lungs. The condition they have is known as reactive airways disease.

93. In evaluating workers for occupational injuries to their lungs, I take into account their smoking history. Smoking is not an unusual habit to find in blue collar workers.

94. In evaluating the workers in my differential diagnosis list, I considered other causes of the signs and symptoms the workers were presenting. I performed tests to rule out those other causes. Tests were performed to rule out infectious process, heavy metals and other diseases or illnesses.

95. After diagnosis was reached with each individual patient, I made appropriate referrals for rehabilitation. The rehabilitation may have been, depending on the patient, the providing of medical treatment for their respiratory problems, cognitive rehab for their brain damage and psychological counseling for the personal problems associated with the injury.

96. Many of the workers presented with complaints of joint pain. With those patients appropriate medical treatment was instituted for alleviate the joint pain.

97. Many of the workers had problems with reaction to chemicals and this was analyzed. This was analyzed in terms of straight physical responses and also in terms of psychological implications. In this area there was also the implications in changes in their cognitive functioning.

98. Medical science has recognized that there is psychological sequela following toxic insults. This area has been researched. There are various modalities for evaluating and treating individuals for the psychological sequelae resulting from a toxic exposure.

99. Chapter 42 in Hazardous Material Toxicology is entitled Psychological Sequela of Chemical and Hazardous Material Exposure. In the these workers there were varying degrees of psychological sequela following this exposure. The psychological sequela, depending upon the patient, was as a result of undergoing this experience and then having concomitant changes in their mental and biological functioning. See Exhibit I.

100. I applied a logical scientific process with each individual patient. I considered the patient's presentation as a group and individually. This would be an appropriate approach in occupational medicine.

101. My evaluations and reasoning process has been

explored extensively in days of deposition.

102. The following is a summary of the individual workers.

103. Dan Skeman, I believe, was most profoundly injured of all the workers. From history and investigation, it appears that he had one of the greater exposures. He had a lost of consciousness. Merlin Carlson also lost consciousness. His changes in his personality and function were collaborate with objective tests. Those objective tests included neuropsychological evaluations by numerous neuropsychologists. Respiratory problems, dermal problems, and behavioral problems. More probably than not Dan Skeman's change in his pulmonary function, neuropsychological function, personality problems, joint problems, skin problems, and respiratory problems was caused by the chemical exposure in the 1988 clean up. Had he had appropriate protective gear, he probably would not have been injured.

104. Merlin Carlson was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

105. Merlin Carlson has objective documentation of changes in his neuropsychological functioning, cognitive functioning, behavioral functioning. He has objective demonstrations of changes in his pulmonary system. He has reactive airway disease. He has chronic problems with joint pain, fatigue, rashes and changes in his ability to consume things, such as food. The above conditions and illnesses have been documented and evaluated by appropriately recognized medical means.

106. Merlin Carlson was more probably than not injured by the failure to have adequate respiratory and skin protection while he was working with the chemicals.

107. Tim Schudel was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

108. Tim Schudel has reported the following as a result of his exposure to toxic solvents at Kaiser in 1988: cough, rash, and memory problems. He has also reported irritability, sleep problems, and mood swings. He has reported a tightening and

squeezing sensation in his chest and increasing cough, lung problems and multiple upper respiratory infections. He has reactive airways disease syndrome. He has extreme anxiety concerning his physical health and a fear of exposure to chemicals. These complaints by Tim Schudel are consistent with exposure to toxic chemicals.

109. Tim Schudel was exposed to toxic solvents during the clean up at Kaiser in 1988; he was not provided with adequate respiratory protection, wearing only paper face masks and respirators provided by Kaiser and General Electric.

110. Tim Schudel had a pre-existing history of smoking. I took that into account in my evaluation of his exposure to toxic substances. It is fairly common that blue collar workers would smoke. A person who smoked would be susceptible to injury to the chemicals present at the 1988 clean up. Taking all of Tim Schudel's health history into account more probably than not his pre-existing health conditions were exacerbated by the unprotected exposure to the chemicals at the 1988 clean up.

111. I understand Tim Schudel has been seen by pulmonalogists. A pulmonalogists would be involved in evaluating how the different structures of the respiratory system are effected by smoking and these chemicals.

112. Craig Thompson was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

113. Craig Thompson was exposed to toxic solvents at the Kaiser clean up in 1988. I initially treated him for complaints of a cough, headaches, and memory loss. He reported that he had a "high" sensation while working at Kaiser. He also has reactive airways disease syndrome. Persons with reactive airways disease syndrome have an increased susceptibility to having more problems with upper respiratory infections, and have a more difficult time than others in clearing them because of the reactivity of their lungs. As with most of the other patients involved in this incident, he had aches and pains in his hands and legs. He has a general fear of being around anything regarded as a chemical. He has problems with organization and sequencing things to get coordinated. He has repeated infections and repeated problems with his lungs. He has shortness of breath, and a persistent cough.

114. Mr. Thompson was exposed to such toxic solvents during the Kaiser clean up in 1988. Like the other workers, he had only minimal protection, consisting of paper face masks and paper body suits.

115. Craig Thompson had pre-existing health habits which could cause problems with his lungs and liver. The scientific literature I previously identified for the Court indicates the chemicals at the 1988 clean up are metabolized out of the human body by various organs. Two of the organs involved in metabolizing these chemicals are the lungs and liver. Unhealthy lungs and liver would effect the bodies ability to metabolize and process these chemicals. I discussed the status of Craig Thompson's pre-existing health conditions in my deposition.

116. Craig Thompson's pre-existing alcohol use makes it difficult to assess the impact of neurotoxic chemicals on the brain. A person with a significant alcohol use history is more susceptible to neurological impact from neurotoxic chemicals. I referred Mr. Thompson to Dr. Paul Domitor for evaluation of these conditions.

117. Craig Thompson's pre-existing health conditions were more probably than not aggravated by his exposure to the chemicals used in the 1988 clean up.

118. Deborah Guaragna Williams was examined by me. I am one of her treating physicians.

119. Debbie Guaragna Williams had a pre-existing history of smoking. I took that into account in evaluating her. Debbie Guaragna Williams had a history of upper respiratory infections. I also understand Debbie Guaragna Williams has been extensively evaluated by Dr. Morton at the Oregon Health Science Center.

120. Debbie Guaragna Williams has been followed more extensively in Western Washington and Oregon. On the diagnosis of her present condition, I would defer to the doctors who are her primary care physicians.

121. Deborah Guaragna Williams has a history of repeated upper airway infection and upper respiratory infections. She has a history of ear infections since the exposure. She has also complained of headaches. Irritation to her mucus membranes during the exposure and resulting reactive airways disease syndrome make persons so affected more susceptible to infections

and irritation. Ms. Guaragna Williams also suffers from shortness of breath and hypersensitivity to odors. Her activity level is significantly reduced. She is easily fatigued.

122. Ms. Guaragna Williams was also exposed to toxic solvents at the Kaiser plant without adequate protection, i.e., she also had only paper face masks and suits.

123. Kathrene Froese came to me with problems of breathing and sensitivity to odors. She also complained of headaches and a cough. She also had a rash while working at Kaiser. She has an increased susceptibility to respiratory infections because of her exposure at Kaiser. She also has had problems with joint and bone aches and pains.

124. Kathrene Froese's problems are consistent with toxic poisoning. She was exposed to chemical solvents given inadequate protection, i.e., paper face masks and body suits only. She was exposed to these chemicals while working at the Kaiser plant in 1988.

125. I took into account Ms. Froese's pre-existing smoking history and intellectual ability. As I mentioned above and below, there are implications associated with smoking and lowered intellectual ability when a person is exposed to these chemicals. There are also implications as far as sorting out the test results. Kathrene Froese's pre-existing condition was more probably than not aggravated by her exposure to the chemicals.

126. Dan Glass was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

127. Dan Glass came to me for heart palpitations, memory loss, and a rash. He also complained of irritability and depression.

128. Such symptoms are consistent with toxic poisoning. Mr. Glass was exposed to toxic solvents while working at the Kaiser Aluminum plant in 1988; he was provided only with a paper suit for protection.

129. I took Dan Glass's pre-existing health and intellectual condition into account in evaluating him. Dan Glass through the years was in special education programs. He has a relatively low intellectual capacity. This is not atypical in blue collar workers who are performing jobs such as Dan Glass did. A

pre-existing low intellectual ability makes it difficult to evaluate a person's neuropsychologically because their scores are so low. A person with a pre-existing low I.Q. has more to loose than someone with average or higher I.Q. More probably than not the exposure to the chemicals aggravated Dan Glass's pre-existing condition, including his limited intellectual ability.

130. David Schudel was examined extensively by me. I am one of his treating physicians. I have followed him through rehabilitative treatment and maintenance care for several years.

131. David Schudel came to me for a persistent cough and memory problems. He later stated that cleaners, solvents, and other fumes caused him breathing problems. He also had a rash following his chemical exposure to Kaiser. He has also developed a baseline obstruction of the small and large airways. He also has a fear and aversion to chemicals or anything that can be regarded as a chemical. The exposure at Kaiser was the inciting incident for his subsequent development of the fear of chemicals. He has also complained of depression. It is necessary for his to use an air purification device in his house. He has adult on-set asthma and also bone and joint aching.

132. David Schudel has a history of smoking. As I mentioned with the previous workers, the fact that a blue collar worker smokes is not atypical. The pathophysiological dynamics that I previous mentioned with the other workers would be applicable to David Schudel.

133. I took Mr. David Schudel's pre-existing smoking history into account in evaluating him. More probably than not the exposure to the chemicals aggravated the pre-existing status of his lungs.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED and signed this 7 day of March, 1994 in Spokane, Washington.

/s/_____
Paula Lantsberger, M.D.